No. 87-1262

Supreme Court, U.S.
FILED
JAN 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JACK R. ROGERS, GEORGE MICHLIK and D & R WELDING SUPPLY COMPANY, an Illinois Corporation, and RAYMOND E. BRIDGES and BRIDGES WELDING SUPPLY & THERAPY, INC.,

Petitioners,

v.

LIQUID AIR CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRANK H. BYERS II*
JOHN L. GREENLEAF, JR.

BYERS, BYERS & GREENLEAF, LTD.
SUITE 100, 333 E. PERSHING ROAD
DECATUR, ILLINOIS 62526
TELEPHONE: (217) 877-5353

Attorneys for Petitioners, Jack R. Rogers, George Michlik and D & R Welding Supply Company

WILLIAM A. MCNUTT*

LOWE, MOORE, SUSLER, MCNUTT & WRIGLEY
250 N. WATER ST., P. O. BOX 1527
DECATUR, ILLINOIS 62525
TELEPHONE: (217) 429-5323

Attorney for Petitioners, Raymond E. Bridges and Bridges Welding Supply & Therapy, Inc.

**COUNSEL OF RECORD*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether the "pattern of racketeering activity" requirement of the Racketeer Influenced and Corrupt Organization Act, 18 *U.S.C.* §§1961, et seq., (hereinafter called "RICO"), is met where the alleged predicate acts consisted of 16 allegedly false shipping orders over a few months in a single-purposed, close-ended scheme to defraud one victim?
2. Whether defendants in a civil RICO action should be afforded rights of criminal defendants, including the criminal standard of proof for the alleged predicate acts?
3. Whether vicarious liability may be imposed under Civil RICO to a corporation who did not exist until after completion of all the allegedly false shipping orders, except the final one?
4. Whether the verdict, as trebled, violates the Eighth Amendment to the Constitution of the United States of America?
5. Whether the trial court used the appropriate measure of damages?

PARTIES

Jack R. Rogers, George Michlik and Raymond E. Bridges are individual citizens of the United States of America. D & R Welding Supply Company and Bridges Welding Supply & Therapy, Inc. are Illinois corporations, are not publicly owned, are not the subsidiary of any other corporation, partnership or enterprise, and are not the parent corporations to any subsidiaries. Jack R. Rogers is hereinafter referred to as "Rogers". George Michlik is hereinafter referred to as "Michlik". Raymond E. Bridges is hereinafter referred to as "Bridges". D & R Welding Supply Company is hereinafter referred to as "D & R". Bridges Welding Supply & Therapy, Inc. is hereinafter referred to as "Bridges Welding".

Liquid Air Corporation, is a Delaware corporation, of which a corporation named L'Aire Liquide owns 10% or more of its stock. Petitioners are uninformed of any other related interests of the respondent, if any, that may be required to be disclosed pursuant to Supreme Court Rule 28.1. Respondent is hereinafter referred to as "Liquid Air".

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTION	2-3
STATUTES	3
STATEMENT UNDER RULE 28.4(b)	3
STATEMENT	3-9
SUMMARY OF ARGUMENT	9-10
REASONS FOR GRANTING THE PETITION	11-29
SECTION I	12-15
SECTION II	15-22
SECTION III	22-24
SECTION IV	24-27
SECTION V	27-29
CONCLUSION	29

APPENDIX

Opinion of the United States Court of Appeals, dated November 13, 1987	1a
Judgment of the United States Court of Appeals, dated November 13, 1987	24a
Order of the United States Court of Appeals, dated December 10, 1987	26a
Order of the United States Court of Appeals, dated December 10, 1987	28a

Second Amended Judgment of the United States District Court, dated November 17, 1986 ..... 30a

Second Amended Judgment Order of the United States District Court, dated November 14, 1986 ..... 32a

Order of the United States District Court, dated October 14, 1986 ..... 34a

Findings of Fact and Conclusions of Law of the United States District Court, contained in excerpts from trial transcripts dated October 14, 1986, and November 14, 1986 ..... 35a

Judgment of United States District Court, dated December 18, 1986 ..... 39a

Order of United States District Court, dated December 16, 1986 ..... 41a

Fifth Amendment to the Constitution of the United States of America 43a

Sixth Amendment to the Constitution of the United States of America 43a

Eighth Amendment to the Constitution of the United States of America 43a

Section 1 of RICO, 18 *U.S.C.* §1961 ..... 44a

Section 2 of RICO, 18 *U.S.C.* §1962 ..... 46a

Section 3 of RICO, 18 *U.S.C.* §1963 ..... 48a

Section 4 of RICO, 18 *U.S.C.* §1964 ..... 49a

Index to the Trial Transcript 51a

TABLE OF AUTHORITIES

A. CASE AUTHORITIES

	Page
Addington v. Texas, 441 U.S. 418 (1979)	19,22
Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 89 L.Ed.2d 823 (1986)	25
Banker's Life & Casualty Co. v. Crenshaw, 483 So.2d 254 (Miss. 1986), *petition for cert. granted*, No. 85-1765	27
Bank of America v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986)	12
Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1885)	16,17
Electrical Workers v. Faust, 442 U.S. 42 (1979)	25
Haroco v. American National Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984) *aff'd.* 473 U.S. 606 (1985)	23
Herman and McClean v. Huddleston, 459 U.S. 375 (1983)	7
Ingraham v. Wright, 430 U.S. 651 (1977)	26
In re Winship, 397 U.S. 358 (1970)	18,22
Lees v. United States, 150 U.S. 476 (1883)	21
Lipin Enterprises, Inc. v. Lee, 803 F.2d 322 (7th Cir. 1986)	15
Marks v. Pannell Kerr Forster, 811 F.2d 1108 (7th Cir. 1987)	15
Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986)	12,13,15
One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)	16,17
Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985)	8,9,12,13,14,15,18,21,28,29
Smith v. Wade, 461 U.S. 30 (1983)	25
Stontosky v. Kramer, 455 U.S. 745 (1982)	21
Superior Oil Company v. Fulmer, 785 F.2d 252 (8th Cir. 1986)	12,14

Table of Authorities Continued

Page

Tellis v. United States Fidelity & Guaranty Company, 805 F.2d 741 (7th Cir. 1986) *vacated*, 107 S.Ct. 3255 (1987) 20

B. STATUTES

18 *U.S.C.* §1341 6,17
18 *U.S.C.* §1343 6,17
18 *U.S.C.* §1961 3,11,20
18 *U.S.C.* §1962 3,6,8,23,24
18 *U.S.C.* §1963 3
18 *U.S.C.* §1964 3,27
28 *U.S.C.* §1254(l) 2
28 *U.S.C.* § 2403(a) 3

C. UNITED STATES CONSTITUTION

U.S. Const. amend V 2,25
U.S. Const. amend VI 3,25
U.S. Const. amend VIII 3,25

D. OTHER AUTHORITIES

Insurance Litigation Reporter, October, 1985 - February, 1986 26

Towers, *Burden of Proof in RICO Actions; Does Sedima Provide Guidance?* The National Law Journal, December 2, 1985, at page 26 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JACK R. ROGERS, GEORGE MICHLIK and D & R WELDING SUPPLY COMPANY, an Illinois Corporation, and RAYMOND E. BRIDGES and BRIDGES WELDING SUPPLY & THERAPY, INC.,

Petitioners,

v.

LIQUID AIR CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Jack R. Rogers, George Michlik and D & R Welding Supply Company, Inc., an Illinois Corporation, and Raymond E. Bridges and Bridges Welding Supply & Therapy, Inc., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-captioned proceeding on November 13, 1987, as amended by the Orders of December 10, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 834 F.2d 1297 (7th Cir. 1987) and is reprinted in the Appendix hereto commencing at page 1a.

The Orders of the United States District Court for the Central District of Illinois, Peoria Division, are unreported. They are reprinted in the Appendix hereto commencing at page 30a.

Reference to the Opinions and Orders below shall be to the appropriate page of the Appendix and designated as "app. ___". Reference to the record shall be to the appropriate page of the volumes identified in the chart in the Appendix hereto commencing at page 51a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit, which the petitioners request this Court to review, was entered on November 13, 1987, and amended by Order dated December 10, 1987. A Petition for Rehearing with suggestion for rehearing *en banc* was denied on December 10, 1987. This Petition for Writ of Certiorari is filed within 90 days of the entry of that Order. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* §1254(1).

CONSTITUTION

The Fifth Amendment to the Constitution of the United States of America, *U.S. Const.*, amend. V, is set forth in the Appendix hereto at page 43a.

The Sixth Amendment to the Constitution of the United States of America, *U.S. Const.*, amend. VI, is set forth in the Appendix hereto at page 43a.

The Eighth Amendment to the Constitution of the United States of America, *U.S. Const.*, amend. VIII, is set forth in the Appendix hereto at page 43a.

STATUTES

Section 1 of RICO, 18 *U.S.C.* §1961, is set forth in the Appendix hereto at page 44a.

Section 2 of RICO, 18 *U.S.C.* §1962, is set forth in the Appendix hereto at page 46a.

Section 3 of RICO, 18 *U.S.C.* §1963, is set forth in the Appendix hereto at page 48a.

Section 4 of RICO, 18 *U.S.C.* §1964, is set forth in the Appendix hereto at page 49a.

STATEMENT UNDER RULE 28.4(b)

Since this proceeding draws into question the constitutionality of the treble damage provision of §1964(c) of the Racketeer Influenced and Corrupt Organization Act, 18 *U.S.C.* §1964(c), an act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 *U.S.C.* §2403(a) may be applicable. The courts below have not certified to the Attorney General the fact that the constitutionality of such act of Congress was drawn into question.

STATEMENT

1. At trial the following facts were introduced into evidence:

D & R is an Illinois corporation of which two of its shareholders are Jack R. Rogers and George Michlik. D & R distributes welding supplies and compressed gases in Central Illinois and is involved in interstate commerce. (app. 2a). Some compressed gases distributed by D & R are bottled in steel cylinders. D & R both purchased and leased these cylinders. (app. 2a, Transcript V.5 pp.4, 5,13,14,19-29).

Initially, D & R was a distributor for Liquid Air. As part of the distributor arrangement, D & R leased steel cylinders from Liquid Air. After notification of price increases, D & R terminated its distributorship with Liquid Air effective September, 1981. Under the cylinder lease agreement with Liquid Air, D & R was obligated to return leased gas cylinders to Liquid Air, pay rent on the outstanding cylinders, or pay the then current cost of replacement, allowing for ordinary wear and tear, for any cylinders not returned or accounted for. (app. 2a, Plaintiff's Exhibit No. 25-1).

In March, 1982, Liquid Air requested D & R to start turning in its compressed gas cylinders. D & R had approximately 5,196 cylinders on lease from Liquid Air at that time. By November 1, 1982, D & R had returned 2,199 cylinders. From November 1, 1982, until May 25, 1983, 19 Liquid Air shipping orders were prepared which reflected all but 12 of the remaining cylinders being returned by D & R. Of the said 19 shipping orders, 15 were executed on behalf of D & R by Rogers, Michlik or Mr. Oliver Pennypacker. Additionally, one shipping order was not signed by a representative of D & R. Liquid Air alleged that these 16 shipping orders which reflect a total return of 2,681 cylinders were false. Two of the three remaining shipping orders were executed for D

& R by its regular drivers, Mr. Gene Wilder and Mr. Robert Bauer. Liquid Air did not contest the validity of those shipping orders. The final shipping order was a paper transfer on the records of Liquid Air of 40 cylinders from the account of D & R to the account of A.W. Moore Welding Supply Co., the validity of which was not contested. (Transcript V.5, p.83; V.14, p.116; Plaintiff's Exhibit No. 1; V.19, p.8; V.13, p.40; V.14, pp. 128-129)

Liquid Air claimed that Ray Bridges, an employee of Liquid Air responsible for handling all of the paperwork at Liquid Air's Peoria distribution center, falsified the said 16 shipping orders so that it would appear that D & R had returned all outstanding cylinders when, in fact, the returns were not made. Each shipping order involved a transaction using the mails twice and one wire transfer. Liquid Air further claimed that in return for Bridges' efforts, Rogers and Michlik arranged to set Bridges up in his own welding business in Peoria, Illinois. Liquid Air claimed that Rogers and Michlik supplied Bridges Welding with personnel, capital and welding products. (app. 2a, 3a).

In August, 1983, a Liquid Air employee compared Liquid Air's inventory of cylinders on paper to the physical inventory taken in Peoria for July, 1983. The comparison revealed a discrepancy of 3,307 cylinders between those that Liquid Air counted and those that its internal documents registered. (app. 3a).

2. Procedural History in the Trial Court.

On April 4, 1984, Liquid Air filed a Complaint against Rogers, Michlik, D & R, Bridges and Bridges Welding. The ensuing jury trial lasted approximately

two and one-half weeks on the nine-count Amended Complaint. The jury found against all defendants on the RICO counts, Counts I, II, III and IV (18 *U.S.C.* §1962(a),(b),(c) and (d) respectively), and assessed compensatory damages in the amount of $750,000.00. The predicate acts alleged in the RICO counts were mail fraud, 18 *U.S.C.* §1341, and wire fraud, 18 *U.S.C.* §1343. In Count V, a common law conversion count, the jury found against all defendants and assessed $350,000.00 in actual damages and punitive damages in the following amounts: $25,000.00 against D & R; $15,000.00 against Bridges Welding; $10,000.00 against Rogers; $10,000.00 against Michlik; and $5,000.00 against Bridges. On Count VI, a claim for breach of fiduciary duty by Bridges, the jury found against Bridges and assessed $4,000.00 in actual damages and $1,000.00 punitive damages against him. In Count VII for inducement to breach a fiduciary relationship, the jury found against Rogers, Michlik and D & R, and assessed actual damages in the amount of $750,000.00 and punitive damages in the amount of $10,000.00 against D & R, Rogers and Michlik. The jury found in favor of Bridges on Counts VIII and IX. (app. 3a, 4a).

Pursuant to the Order of the U.S. Magistrate, the defendants had held certain Liquid Air cylinders in its possession until after the trial at which time the defendants returned 530 cylinders to Liquid Air pursuant to the order of district court. The district court ordered that the replacement value of the 530 cylinders be subtracted from the total trebled damage award. (Trial Court Docket No. 82; Transcript V.20, p.34; V.21, p.13).

The Petitioners have timely raised the issues presented to this Court and each of the courts below.

3. Proceedings in the Court of Appeals:

The court of appeals affirmed the judgment focusing much of its opinion on the issues raised in this petition.

First considered by the court was whether civil RICO proceedings are quasi-criminal in nature. The court of appeals determined that civil RICO proceedings are not quasi-criminal reasoning that a civil RICO defendant does not face imprisonment nor does the defendant face the collateral consequences associated with conviction of a criminal offense. (app. 7a). Although the court of appeals acknowledged that a civil RICO defendant does face the opprobrium of being labeled a racketeer, it determined that such a label was not sufficiently stigmatizing to warrant criminal protections. Therefore, the court rejected the criminal standard of proof and other rights asserted by the defendants. (app. 7a).

Alternatively, proof by a preponderance of the evidence was considered by the court to be sufficient for a finding of liability under civil RICO. (app. 8a). In so holding, the court stated that this Court's opinion in *Herman and McClean v. Huddleston*, 459 U.S. 375 (1983) foreclosed the use of the standard of proof of clear and convincing evidence. The court could discern no reasonable basis for distinguishing a federal securities claim based on fraud from a civil RICO claim based on fraud. Therefore, the court did not apply the clear and convincing standard. (app. 7a, 8a).

Next addressed by the court of appeals was the question of proof sufficient to satisfy the requirement

of a pattern of racketeering activity. The court of appeals noted the conflict among the various circuits concerning whether the predicate acts must be a part of two separate schemes before a pattern could be shown or whether they can be part of a single scheme. (app. 10a). The court of appeals found that there was a single scheme which lasted seven months and defrauded a single victim by the preparation of 19 shipping orders, each resulting in the use of the mails and the use of the wire service. The court held that a repeated infliction of economic injury upon a single victim in a single scheme is sufficient to establish a pattern of racketeering activity for the purposes of civil RICO. (app.10a, 11a).

Furthermore, the court held that the jury instruction concerning the phrase "pattern of racketeering activity" did not need to advise the jury of the continuity prong of this Court's test of "pattern of racketeering activity" as announced in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985). The jury instruction that the court approved on "pattern of racketeering activity" omits categorically any reference to continuous, continuing, or threat of continuing activity. The court of appeals determined that continuity refers solely to the duration of the predicate acts. (app. 19a).

The application of the doctrine of *respondeat superior* was also considered by the court. Under §1962(a) and (b) of RICO, Bridges Welding was found liable applying what the court called "vicarious liability". The court stated that the shipping orders were completed by Bridges, acting as president of Bridges Welding, despite the fact that the falsification of shipping orders allegedly done by Bridges were all accomplished prior to Bridges Welding doing any

business and, except for one shipping order, before Bridges Welding was ever incorporated. (app.14a, 16a).

Finally, the court determined that under civil RICO the measure of damages is the harm occasioned as a result of the predicate acts and held that the contract between D & R and Liquid Air determined the damages for all the defendants. (app.21a). The court rejected the measure of damages as the fair-market-value of the cylinders not returned. (app. 22a). The court of appeals further rejected the challenge to the trebled damage provision of RICO as violative of the Eighth Amendment proscription against excessive fines. The court stated that although there is some sense in which RICO trebled damages are punitive, they are largely compensatory. (app. 23a).

SUMMARY OF ARGUMENT

This case brings to issue the conflict among the circuit courts of appeal concerning the requirement of a "pattern of racketeering activity" following this Court's decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985). A single, close-ended scheme of short duration with a single purpose to defraud one victim is not a "pattern of racketeering activity" which should invoke the heavy civil penalties of RICO. Contrary to the Eighth Circuit, in the instant decision, the Seventh Circuit has joined the Eleventh Circuit and abandoned the "continuity" requirement necessary to establish a "pattern of racketeering activity" as articulated in *Sedima, supra.*

The potential operation and effect of RICO upon defendants in a civil action to enforce RICO warrant the protections provided by federal criminal law. In-

deed, the financial loss to the defendants in civil RICO is greater than the financial punishment which could be inflicted upon conviction of the underlying predicate acts. This, together with the social stigma of being labeled a "racketeer", and the penal nature of the civil RICO as envisioned by Congress, mandates the enhanced protections not usually accorded civil defendants.

Bridges Welding, a corporation peripheral to the alleged scheme, should not be held vicariously liable for the actions of a minority shareholder and officer, which were committed prior to its incorporation. Moreover, under RICO, there could not be a "pattern of racketeering activity" during the time period when the agency-principal relationship existed. Contrary to the holding of the Seventh Circuit, a corporation, to be found liable under the statute, must more than just "benefit" from the RICO violation.

The verdict, as trebled, violates the prohibition against the imposition of excessive fines under the Eighth Amendment to the Constitution of the United States of America.

Finally, the wrong measure of damages was used by the courts below. An error in the underlying judgment is magnified by the trebling of damages in RICO. It is not sufficient to look solely to the perceived loss to the plaintiff, but the court must also look at the nature of the defendants actions and the context in which the claimed losses have arisen. Here the gravamen of the action is the common law tort of conversion, and, thus, the appropriate measure of damages is the fair-market value of the property converted.

REASONS FOR GRANTING THE PETITION

This case raises several important issues with respect to the civil enforcement of RICO, 18 *U.S.C.* §1961, et seq. Specifically, it concerns the rights a defendant should have under RICO, the required proofs the plaintiff must present, and the kind of damages recoverable. These issues effect plaintiffs and defendants in civil RICO actions throughout the country and are arising with increasing frequency. In dealing with these issues the circuit courts of appeal have rendered several recent inconsistent decisions. None of the issues raised in this Petition have yet been decided by this Court.

In this case, Liquid Air has been able to parlay a claimed conversion, by otherwise legitimate businessman, of property with a fair-market value of $293,000 into a judgment in excess of $2.8 million. Under the provisions of RICO, the plaintiff transformed this case, which ordinarily would have been presented as a breach of contract or, at most, a common law fraud action under State law, into a federal court action with catastrophic results. Affirmance of the judgment in this case will rob the defendants of the labor of their lifetime and leave them virtually pennyless. Left unchecked, plaintiffs, who may have absolutely no interest in pursuing the organized criminals which RICO was designed to combat, are flocking to the federal courts for the windfall profits available under RICO for what would otherwise be ordinary contract disputes and common law fraud claims.

I. A CLOSE-ENDED SINGLE SCHEME TO DEFRAUD ONE VICTIM THROUGH 16 ALLEGEDLY FALSE INVOICES OVER THE COURSE OF A FEW MONTHS DOES NOT SATISFY RICO'S REQUIREMENT OF A "PATTERN OF RACKETEERING ACTIVITY"

Sharply, this case focuses the conflicting positions taken by different circuit courts of appeal as to the "pattern of racketeering activity" requirements of RICO. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), this Court noted that a "pattern of racketeering activity" required more than just two acts committed within a ten year period. Those acts must have "*continuity plus relationship* which combines to produce a pattern." (*Sedima* at 473 U.S. page 496 N.14; app. 10a). Application of that definition, however, has produced different results.

The Eighth Circuit Court of Appeals requires that the predicate acts compromise more than one scheme before a pattern of racketeering activity may be found. See *Superior Oil Company v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). (app. 10a). On the other hand, the Eleventh Circuit Court of Appeals requires only two or more predicate acts to be committed in a single scheme in order to establish a pattern of racketeering activity. See *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986). (app. 10a). Different still was *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), where the Seventh Circuit opted for a middle course between what it termed as the two extremes. In order to be sufficiently continuous to constitute a pattern of racketeering activity, it said, "the predicate acts must be ongoing over an identified period of time so that they can be fairly

viewed as constituting separate transactions, i.e., "transactions 'somewhat separated in time and place.' " " *(Morgan*, 804 F.2d at page 975). *Morgan* identifies relevant factors, with no one factor necessarily determinative, to be considered in determining whether a pattern exists.

In this case, the Seventh Circuit has held that if the alleged fraud can be perceived as a repeated infliction of economic injury, even if done to just one victim and in the course of one scheme, that is sufficient to establish a "pattern of racketeering activity" for civil RICO purposes. Under the Seventh Circuit's analysis here, the finding of distinct injuries determines the pattern requirement. If there are distinct injuries, this opinion mandates the finding of a pattern of racketeering activity. This opinion effectively forecloses inquiry into the other factors listed in the Seventh Circuit's own decision in *Morgan*. In this case, the Seventh Circuit has now adopted the position of the Eleventh Circuit that a plaintiff needs only to show that two or more predicate acts are committed in the performance of a single scheme. This expansive view of RICO conflicts with this Court's admonishment in *Sedima* that two of anything does not make a pattern.

The abandonment of the rational of *Morgan* by the Seventh Circuit is underscored by their approval of the erroneous jury instruction used in this case to define "pattern of racketeering activity." The Seventh Circuit approved a jury instruction on "pattern of racketeering activity" that omits categorically any reference to continuous, continuing or threat of continuing activity. In so doing, this Seventh Circuit's opinion highlights the abandonment of the first part

of the two-part test established by this Court in *Sedima*. Emphasis by the Seventh Circuit is now on the relationship between the predicate acts and no longer is there a separate continuity requirement as established in *Sedima*. No more clearly could the issue of what constitutes a pattern of racketeering activity and the conflicting positions of the various circuit courts of appeal be presented to this Court than is presented in this case.

Whether there is one injury or more than one injury in a single scheme to defraud a single victim is really a matter of perception. In this case the alleged scheme was to show, by false paperwork, all leased cylinders returned by D & R when, in fact, they had not been returned. By its terms, the scheme required several false papers to be prepared. At the same time, however, it was a close-ended scheme. It had a single purpose, and it was necessarily terminated when all leased cylinders were shown to be returned. Thus, whether there was one injury or more than one injury depends upon one's view of the transaction. Since D & R had all the cylinders at the beginning of the alleged scheme and then had all the same cylinders at the end of the alleged scheme, one could just as certainly state that there was but one injury to Liquid Air by the failure to return the leased cylinders. On the other hand, one could break the scheme down into separate actions and declare each paper transaction to be a separate and distinct injury. Such was done by the Seventh Circuit in its opinion.

This dissection of a single close-ended scheme to defraud one victim in order to find a pattern of racketeering activity dramatically conflicts with the Eighth Circuit's decision in *Superior Oil Co. v. Fulmer, su-*

pra, and even with the Seventh Circuit's prior decision in *Morgan*. The Seventh Circuit, like the Eleventh Circuit, is no longer concentrating civil RICO on the offenders who pose a threat of continuing activity or those who regularly commit such crimes as it once had. See, *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322 (7th Cir. 1986) at page 324 and *Marks v. Pannell Kerr Forster*, 811 F.2d 1108 (7th Cir. 1987) at page 1111.

Earlier, the Seventh Circuit had established the definition of "continuity" in *Morgan* based upon *Sedima*. The Seventh Circuit stated that continuity "would embrace predicate acts occuring at different points in time or involving different victims". *Morgan*, 804 F.2d at page 975.

Now, the Seventh Circuit has abandoned that definition. The Seventh Circuit stated in the instant opinion that "continuity refers instead to the duration of the predicate acts." (app.19a). Thus, continuity now refers to the period of time, or duration, over which the predicate acts occurred in the same scheme rather than to the existence of other schemes, other victims or predicate acts which occurred at different points in time. The search for continuity is now an internal quest rather than an external one. The Seventh Circuit abandoned the "continuity" requirement established by this Court in *Sedima*.

II. DEFENDANTS IN A CIVIL RICO ACTION SHOULD BE AFFORDED RIGHTS OF CRIMINAL DEFENDANTS INCLUDING THE CRIMINAL STANDARD OF PROOF FOR THE ALLEGED PREDICATE ACTS.

This case uniquely raises the issue of whether, and to what extent, constitutional criminal law protections

should apply to the civil enforcement of RICO, wherein the gravamen of the Complaint alleges criminal conduct, provides for punishment damages and irreparably stigmatizes the defendants who are found liable. The rights afforded criminal defendants, i.e. for a twelve-member jury, the privilege against self-incrimination, the standard of proof for conviction of beyond a reasonable doubt, and the presumption of innocence all apply to the predicate acts alleged in this case when criminally prosecuted. They should also apply in the private enforcement of RICO.

Whether an action is quasi-criminal or civil must be decided by the court based upon the statute and its potential operation and effect upon the defendants charged under it. *Boyd v. United States*, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1885).

This Court stated in *Boyd, supra*, at 29 L.Ed. page 752:

> As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution. . . .

To determine whether an action is quasi-criminal, this Court in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), compared the defendant's potential punishment for a criminal conviction of the predicate act with the potential financial loss which the defendant could incur under a statute which based liability upon the predicate act. After noting that the civil punishment was potentially greater than the

criminal punishment, this court in *One 1958 Plymouth Sedan, supra*, held that the "civil" action was quasi-criminal.

In this case the plaintiff alleged that the defendants committed mail fraud (18 *U.S.C.* §1341) and wire fraud (18 *U.S.C.* §1343). Each individual defendant may be punished upon conviction of wire fraud or mail fraud to pay a fine of up to $1,000.00 and/or sentenced for up to 5 years of incarceration. The corporate defendants may incur a fine of up to $1,000.00 upon conviction of mail fraud or wire fraud.

The fair-market value of the cylinders converted is $292,643.40 (the judgment in Count V, less the pre-judgment interest added by the trial court). Nevertheless, each judgment entered on the RICO Counts is $2,168,062 plus attorney's fees, for a total of $2,546,232.58. Certainly, imposing a liability of $2,253,589.18 upon the defendants in excess of the value of the property taken (or in other words, almost 9 times the fair-market value of the property taken) can only be considered an additional penalty for commission of the underlying predicate acts. Comparatively, the corporate defendants could only be fined $1,000.00 for mail and wire fraud, yet, under RICO they have an additional punishment of $2,253,589.18.

The individual defendants could be imprisoned under the wire fraud and mail fraud statutes up to five years in addition to the fines imposed. Individual liberty has an incalculable value. However, a penalty of $2,253,589.18 defies the grasp of most ordinary citizens. Under *Boyd* and *One 1958 Plymouth Sedan*, RICO is a quasi-criminal act in its potential operation and effect upon the defendants.

In *Sedima*, this Court discussed the quasi-criminal nature of RICO, but was not directly faced with the issue, at 473 U.S. pages 492 and 493:

> Finally, to the extent an action under §1964(c) might be considered quasi-criminal, requiring protections normally applicable only to criminal proceedings, cf. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 14 L.Ed.2d 170, 85 S.Ct. 1246 (1965), the solution is to provide those protections, not to ensure that they were previously afforded by requiring prior convictions. (Footnote omitted).

Civil enforcement of RICO internally requires a quasi-criminal nature. This Court in *Sedima* stated at 473 U.S. at page 488:

> [T]he predicate acts involve conduct that is 'chargeable' or 'indictable', and 'offense[s]' that are 'punishable,' under various criminal statutes. §1961(1). As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be.

If liability is predicated upon acts for which the defendants could be criminally convicted, how can it be determined whether these acts could result in a conviction unless the trier of fact makes those findings based upon the same criteria as in a criminal proceeding?

There is a recognizable social stigma which attaches in criminal proceedings which plays a prime importance to the defendants. In *In re Winship*, 397 U.S. 358 (1970), this Court stated at 397 U.S. pages 363 and 364:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

The stigma society places on a defendant in certain "civil" actions is an important consideration in analyzing the nature of the proceeding as this Court stated in *Addington v. Texas*, 441 U.S. 418 (1979), at 441 U.S. pages 425 and 426:

> Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

A defendant in a RICO case risks the social stigma of being labeled a "racketeer", a pejorative term which connotes organized crime. Our society has more than a minimal interest in the outcome of private civil RICO suits. The size of the potential penalty is staggering and far exceeds the criminal fines which could be imposed. The social stigma of being labeled a "racketeer" effects every-day life. Potential penalties have a devastating economic effect on business defendants. In this case the plaintiff and two of the

defendants are competitors. Unbridled RICO claims may reduce competition by driving competitors from the market place. Indeed, RICO was designed to prevent the infiltration of legitimate businesses by organized crime. Instead, RICO is turning ordinary contract disputes (as is this case) into quasi-criminal proceedings. Society's interests should be considered in applying RICO. The plaintiff already has the ability to obtain compensation for damages it suffers under traditional tort and contract claims. RICO does not provide recovery for a victim that otherwise would go uncompensated. RICO only adds a penalty against the defendant to the compensation the victim receives.

In order to impose civil liability under RICO a victim must show that the defendant committed two predicate acts within a ten-year period. If RICO was designed to compensate victims, why did Congress not provide for compensation of the first victim? Why must the first victim wait up to ten years to see if the defendant commits another predicate act? The answer is obvious. Congress did not intend RICO to be a compensation act for victims. Congress intended to punish the repeat offender, the habitual criminal. The civil RICO action is truly an enhanced penalty for the commission of certain offenses enumerated in 18 *U.S.C.* §1961. Congress sought to punish the repeat offenders of those offenses and deter further commission of those offenses. In *Tellis v. United States Fidelity & Guaranty Company*, 805 F.2d 741 (7th Cir. 1986) *vacated*, 107 S.Ct. 3255 (1987), the Seventh Circuit stated at page 746:

> This Court has previously held that a treble damage antitrust suit is most appropriately charac-

> terized as an action for a penalty. . . . (citations omitted.) Because a civil RICO claim is best characterized as an action for treble damages, and such an action is penal in nature, *Electronic Relays*, 610 F.Supp. at 652, . . .

Professor Towers of the Marquette University Law School wrote in *Burden of Proof in RICO Actions: Does 'Sedima' Provide Guidance*? The National Law Journal, December 2, 1985, at page 26:

> Closer scrutiny yields the conclusion that many civil RICO actions are quasi-criminal in nature because they contain those punitive sanctions and stigma characteristic of criminal actions that normally require criminal protections, and therefore, make the criminal burden of proof most appropriate.

It is well established that in certain "civil" cases, where the gravamen is unquestionably criminal (or penal) in nature, that the defendant has certain protections which would also be afforded to him as if the case were tried as a criminal trial. See *Lees v. United States*, 150 U.S. 476 (1893).

Plaintiffs in civil actions to enforce RICO should be required to prove the commission of the predicate acts beyond a reasonable doubt. RICO does not expressly set forth the standard of proof to be utilized in the private enforcement action as authorized. Traditionally, therefore, what standard of proof should be applied is a question left to the courts. *Stontosky v. Kramer*, 455 U.S. 745 (1982). In *Sedima*, this Court did not decide the issue of the proper standard of proof to be used in the civil enforcement of RICO. Applying a "civil" label to an action does not deter-

mine the proper standard of proof to be applied. *Addington v. Texas, supra*, and *In re Winship, supra*. In this case, the quasi-criminal and penal nature of the civil enforcement of RICO constitutionally mandates the beyond a reasonable doubt standard of proof. At the very least, the "clear and convincing" standard of proof for fraud actions should have been applied. Further, the defendants should have been granted a twelve-member jury and other rights afforded criminal defendants.

III. BRIDGES WELDING SHOULD NOT BE VICARIOUSLY LIABLE UNDER RICO

This case raises an important issue concerning the use of "vicarious liability" to hold corporations, peripheral to the alleged scheme, liable for the acts of the principals. Bridges Welding was not incorporated until approximately the time the alleged scheme ended, and it never did any business during the existence of the alleged scheme.

At trial, it was undisputed that Bridges Welding did not have a corporate existence until its incorporation on April 20, 1983. (Transcript V. 5, p.80). The first meeting of shareholders was held on May 7, 1983. (Transcript V. 5, p.80). Bridges Welding had no bank accounts and did not commence business until the latter part of July or early August, 1983. (Transcript V. 12, p.33). Moreover, Ray Bridges received only a minority interest in Bridges Welding. (Transcript V. 12, pp.25-26, 36-38; V. 5, p.80). The majority shockholders were not defendants in this case, nor where they charged with the commission of any predicate acts or with conspiracy to commit any of the predicate acts. (Plaintiff's Exhibits 61-69). Except for Ray Bridges, no other officer or director was a

defendant in these proceedings. Likewise, except for Ray Bridges, no such person was alleged to have been a part of the alleged scheme, and, as to Ray Bridges, he was a defendant only for acts allegedly done prior to Bridges Welding's commencement of business in July-August, 1983.

In addition, it was clear from the testimony at trial that the last alleged fraudulent act occurred on or within a few days of May 25, 1983. (Plaintiff's Exhibits 1 and 2-1 through 2-61). Bridges Welding did not use Liquid Air cylinders and, under the scheme charged, could not have had possession of any Liquid Air cylinders.

For Bridges Welding, the Seventh Circuit did not reach the question of whether subsections (c) and (d) of §1962 of RICO should have been affirmed. Instead, the Seventh Circuit applied "vicarious liability" to affirm the judgment against Bridges Welding under subsections (a) and (b) of §1962 which involved the anti-dated acts of Ray Bridges. (app. 16a). Application of vicarious liability was proper, the court held, because Bridges Welding had "benefit from the violations".

Assuming that Bridges Welding was vicariously liable for the acts of Ray Bridges, only one alleged predicate act occurred after the date of incorporation. Accordingly, for RICO purposes, there could be no "pattern of racketeering activity" during the time period that Bridges Welding stood *respondeat superior* to Ray Bridges.

There are inherit dangers in applying RICO vicariously to corporations. *Haroco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir.

1984), *aff'd.* 473 U.S. 606 (1985). Here, a completely legitimate business has been held liable under RICO. It now owes treble damages for the alleged acts of its minority shareholder and officer. Such a result was never intended by Congress.

The Seventh Circuit Court of Appeals has also broadened the language of subsections (a) and (b) of §1962 of RICO. Subsection (a) requires proof that income from the racketeering activity be used or invested in the enterprise. Whereas, subsection (b) requires that the defendant, through a pattern of racketeering activity, acquire or maintain an interest in the enterprise. The holding in this case, namely that the corporation need only "benefit" from the violations, greatly expands that statutory language of the RICO Act. It broadens the RICO Act to include many non-intended defendants under the statute. This unwarranted and broad expansion of the RICO Act warrants this Court's review of the Seventh Circuit's decision.

IV. THE VERDICT, AS TREBLED, VIOLATES THE CONSTITUTIONAL PROTECTION OF THE EIGHTH AMENDMENT

This case raises an important constitutional issue concerning statutory "punitive" damages. The purposes served by RICO punitive damages are: First, to punish the defendants for their acts, and second, to warn and to deter others from the same type of conduct. These are the classic objectives of criminal law. As set forth above, ironically, the defendants in this case are punished economically more severely than if this action would have been prosecuted criminally. The defendants face a punitive damages award almost nine times that of the fair-market value of the

cylinders allegedly converted without the protection of the Fifth and Sixth Amendments, and in contravention of the Eighth Amendment to the Constitution of the United States. The Eighth Amendment prohibits the imposition of "excessive fines". This Court has looked with disfavor on punitive damage awards in numerous civil cases.

In 1979, this Court stated in *Electrical Workers v. Faust*, 442 U.S. 42 (1979) at page 50, that "because juries are accorded broad discretion both as to the imposition and amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial".

Justice Rehnquist, writing for himself, Chief Justice Warren Burger and Justice Powell, stated in *Smith v. Wade*, 461 U.S. 30 (1983), at page 59:

> Moreover, although punitive damages are "quasi-criminal," . . . their imposition is unaccompanied by the types of safeguards present in criminal proceedings. . . . [T]he alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined.

This Court stated *in dicta* in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 89 L.Ed.2d 823 (1986) at 89 L.Ed.2d page 837:

> [T]hat a $3.5 million punitive damage award is impermissable under the Excessive Fines Clause of the Eighth Amendment; . . . these arguments raise important issues which, in an appropriate setting must be resolved.

The treble damage provision of RICO imposed a catastrophic effect upon the defendants herein in violation of their Eighth Amendment protection against excessive fines. (*See dissent* in *Ingraham v. Wright*, 430 U.S. 651 (1977)). The *Insurance Litigation Reporter*, October, 1985, through February, 1986, issue at page 8 presents a background on the Eighth Amendment stating:

> It is noteworthy that the brief debate on the Excessive Fines Clause at the First Congress immediately followed the debts in the House over the proposed Fifth Amendment. Because the Fifth Amendment contained language that could have been construed to apply outside the context of criminal proceedings, Representative Lawrence proposed, and the House adopted, language to confine the clause 'to criminal cases.' If the framers of the Eighth Amendment had intended that its clauses not apply in civil proceedings, a similar amendment presumably would have been proposed.
>
> Moreover, an examination of the historical antecedents to the Excessive Fines Clause supports the contention that it should be applied to punitive damage awards. The lineage of the Excessive Fines Clause can be traced to the 'excessive amercement' provision of the Magna Carta. 'Amercements' were additional punishment for defendants in civil cases in Thirteenth Century England. In 1689, the English Bill of Rights incorporated the 'excessive amercement' principle of the Magna Carta. That provision was, in turn, incorporated into Article I, §9 of the Virginia Declaration of Rights, and then into the

> Eighth Amendment. Thus, punitive damages are of the same character as the remedies that the linear antecedents of the Eighth Amendment intended to limit.

Currently this Court is considering *Banker's Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1986), *petition for cert. granted*, No. 85-1765. That case presents the question of the constitutionality of common law punitive damages. For the same reasons raised in *Banker's Life* and as set forth above, this Court should grant a Petition for Writ of Certiorari to review the constitutionality of the treble damages awarded to plaintiff.

V. THE WRONG MEASURE OF DAMAGES WERE USED BY THE COURTS BELOW

Nowhere in RICO does the statute define the correct measure of damages. Congress directed only that "[a]ny person *injured in his business or property* by reason of a [RICO] violation . . . may sue therefor . . . and shall recover threefold *the damages he sustains* and the cost of the suit, including a reasonable attorney's fee." 18 *U.S.C.* §1964(c) (Emphasis added) (app. 49a). This case, with its full record, presents this Court with the unique opportunity to determine the correct measure of damages for civil RICO.

In RICO, an error in the underlying judgment is magnified by the trebling of damages. Here, for example, the difference in the measure of damages (between conversion and contract amount the court used) is approximately $430,000. After trebling, it compounds to approximately $1.29 million. Such an error in the verdict has, and will continue to have, devastating effects upon the RICO defendants, making

them the "victim" of this federal action rather than the alleged perpetrators.

The prevailing philosophy of determining RICO damages should be that the "compensable injury necessarily is the harm caused by predicate acts sufficiently related tc constitute a pattern. . . ." (*Sedima*, 473 U.S. at page 497). Accordingly, the plaintiff would recover only to the extent that he has been injuried by the conduct constituting the violation. (*Sedima*, 473 U.S. at page 496).

By what measure the plaintiffs were damaged is a question of law that should not be decided by the perceived need for uniformity. The varying nature of the enumerated predicate acts defy a uniform characterization for a singular measure of damages. Instead, the court should be directed to the gravamen of the action.

In this case, the Seventh Circuit looked to what it perceived as the loss of the plaintiff to determine the appropriate measure of damages. (app. 22a). This measure of damages, however, ignores the second part of this Court's admonition in *Sedima*, 473 U.S. at page 497, that the measure of damages under civil RICO is the harm occasioned *as a result of the predicate acts*. One must not look solely to the perceived loss of the plaintiff as the Seventh Circuit did, but only to those losses which proximately flow from the predicate acts. In other words, one cannot look solely to the perceived loss of the plaintiff, but one must also look to the nature of the defendants' actions and the context in which the claimed losses have arisen, i.e. the gravamen of the complaint.

In this case, under respondent's theory, cylinders were allegedly not returned by D & R. Hence, the

gravamen of the action is the common law tort of conversion. It follows that the appropriate measure of damages is the fair-market value of the property converted. The trial court and Seventh Circuit rejected this measure of damages.

The overly-broad interpretation of the damages under RICO applied by the court of appeals in this case, which permit a plaintiff to recover threefold losses which are not viewed in the context of the alleged actions of the defendants, conflicts in principle with this Court's decision in *Sedima*, as well as the numerous federal and state court decisions establishing the measure of damages in other similar conversion cases. This reason alone warrants that this Court review the Seventh Circuit's decision.

CONCLUSION

This case presents this Court the opportunity to rule on many important issues concerning the civil enforcement of RICO with the benefits of a full and complete record. For the foregoing reasons, it is respectfully requested that a Writ of Certiorari issue to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

FRANK H. BYERS II*
JOHN L. GREENLEAF, JR.
BYERS, BYERS & GREENLEAF, LTD.
333 East Pershing Road
Suite 100
Decatur, Illinois 62525

WILLIAM A. MCNUTT**
LOWE, MOORE, SUSLER, MCNUTT & WRIGLEY
250 North Water Street, P.O. Box 1527
Decatur, Illinois 62523

*Counsel of Record for Jack R. Rogers, George Michlik and D & R Welding Supply Company

**Counsel of Record for Raymond E. Bridges and Bridges Welding Supply & Therapy, Inc.

APPENDIX

APPENDIX A

In the United States Court of Appeals

For the Seventh Circuit

Nos. 86-3001 and 86-3046

LIQUID AIR CORPORATION,

Plaintiff-Appellee,

v.

JACK R. ROGERS, GEORGE MICHLIK and D & R WELDING SUPPLY COMPANY, an Illinois Corporation, and RAYMOND E. BRIDGES and BRIDGES WELDING SUPPLY & THERAPY, INC.,

Defendants-Appellants.

Appeals from the United States District Court for the Central District of Illinois, Peoria Division.
No. 84-C-1110—**Michael M. Mihm**, *Judge.*

ARGUED JUNE 2, 1987—DECIDED NOVEMBER 13, 1987

Before BAUER, *Chief Judge*, COFFEY, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge.*

BAUER, *Chief Judge.* This case raises several issues with respect to civil enforcement of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO"), including (1) what standard of proof should govern civil RICO actions; (2) whether a series of fraudulent acts in a single scheme, with a single victim, satisfies RICO's requirement of a "pattern of racketeering activity;" (3) to what degree may vicarious liability be imposed

under civil RICO; (4) the appropriate measure of damages under RICO; and (5) whether any set-off should be subtracted before or after trebling the damage award under RICO. D & R Welding Supply Company ("D & R") leased compressed gas cylinders from Liquid Air Corporation ("Liquid Air"). Through a series of fraudulent shipping orders, D & R made it appear that it had returned over 3,000 cylinders to Liquid Air. A jury found all defendants guilty of civil RICO and pendent state torts. In addition to the RICO issues, defendants challenge the sufficiency of the evidence, various evidentiary rulings and various jury instructions. For the reasons that follow, we affirm the judgment entered in all respects.

I.

D & R is a partnership operated by Jack R. Rogers and George Michlik to distribute welding supplies. D & R operates out of Decatur, Streator and Urbana, Illinois and is involved in interstate commerce. Among other supplies, it distributed compressed gas. In order to distribute the gas, D & R leased both compressed gas and compressed gas cylinders from Liquid Air. As a result of price increases, D & R gave notice that it would terminate its distributorship with Liquid Air, effective September, 1981. Under its Distributor Agreement with Liquid Air, D & R was required to return leased gas cylinders to Liquid Air, pay rent on outstanding cylinders and pay the replacement value for any cylinders not returned or accounted for. The monthly rental fee then in effect was $2.25 per cylinder; the average replacement cost per cylinder was $150.

D & R was slow in returning the cylinders after it terminated its distributorship. By August, 1982, D & R had returned only 1,570 of 5,000 outstanding cylinders. At this point, Liquid Air began to charge D & R its higher, non-distributor rental rate. Just after Liquid Air raised its rate, Michlik and Rogers became more creative in their business dealings. They enlisted the aid of Ray Bridges, an employee of Liquid Air responsible for handling all

paperwork at Liquid Air's Peoria Distribution Center. Under the scheme, Bridges would falsify documents so that it would appear that D & R had returned all outstanding cylinders. D & R would thus save the rental and replacement fees while retaining the cylinders for its own use. The scheme was accomplished through nineteen separate falsified shipping orders documenting returns that had never been made. Each shipping order involved using the mails twice and one wire transfer.

In return for Bridges's "work", Michlik and Rogers arranged to set Bridges up in his own welding business in Peoria. They supplied Bridges with personnel, capital and welding products. Michlik and Rogers derived an additional benefit from this pay-off to the scheme. Michlik and Rogers were prevented from openly expanding their business into Peoria because of a non-competition agreement with A. W. Moore Welding in Peoria ("Moore Welding"). By setting Bridges up in the welding business in Peoria, Michlik and Rogers could not only bilk Liquid Air of its cylinders, but could also circumvent the non-competition agreement through their participation in Bridges Welding.

In August, 1983, Liquid Air employee Lauren "Bud" Sage became suspicious after hearing that Ray Bridges was seen removing Liquid Air cylinders from the Liquid Air Peoria Distribution Center, supposedly with Sage's okay. Sage initiated an investigation to determine whether D & R had actually returned the cylinders it had leased from Liquid Air. Sage compared Liquid Air's inventory of cylinders on paper to the physical inventory taken in Peoria for July, 1983. The comparison revealed a discrepancy of 3,307 cylinders between those that Liquid Air actually possessed and those that its internal documents registered.

On April 4, 1984, Liquid Air filed a five-count complaint against Michlik, Rogers, D & R, Ray Bridges and Bridges Welding Supply ("Bridges Welding"), which was amended in September, 1984 to include two additional counts. The complaint charged separate RICO violations of 18 U.S.C. § 1962(a), (b), (c) and (d) (Counts I & II, III and IV); con-

version (Count V); breach of fiduciary duty by Ray Bridges (Counts VI and IX); inducement to breach a fiduciary relationship by Michlik, Rogers and D & R (Count VII); and conversion of miscellaneous business supplies by Ray Bridges and Bridges Welding (Count VIII). The predicate acts for the RICO counts were mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343.

The ensuing jury trial lasted approximately two and one-half weeks. The jury found against all the defendants on the RICO counts and on one count of conversion. In addition, the jury found that Ray Bridges had breached his fiduciary duty to Liquid Air in participating in the scheme and that Michlik, Rogers and D & R had induced the breach. The jury returned a verdict for defendant Ray Bridges on the breach of fiduciary duty and conversion associated with the miscellaneous missing business supplies. The jury assessed $750,000 in compensatory damages on all four RICO counts.[1] On the conversion count, the jury assessed $350,000 in actual damages and punitive damages in the following amounts: $25,000 against D & R; $15,000 against Bridges Welding; $10,000 against Rogers; $10,000 against Michlik; and $5,000 against Bridges. On the claim that Ray Bridges had breached his fiduciary duty, the jury assessed $4,000 in actual damages and $1,000 in punitive damages against Ray Bridges. For inducing Ray Bridges to breach his fiduciary duty, the jury assessed $750,000 in actual damages and $10,000 each in punitive damages against D & R, Michlik and Rogers. Sometime after the trial, the defendants returned 530 Liquid Air cylinders and the court ordered that the rental and replacement value of the 530 cylinders be subtracted from the total trebled damage award.

Defendants charge numerous bases for overturning the jury verdicts, which may be grouped as follows: (1) wheth-

[1] Liquid Air's actual recovery was limited to the greatest single recovery under any one count, i.e., treble damages under any of the RICO counts.

er the district court used the proper standard of proof; (2) whether the evidence supports a finding that defendants engaged in a "pattern of racketeering activity;" (3) whether conspiracy is a proper basis for civil liability; (4) whether Bridges Welding was properly found vicariously liable for conversion or RICO; (5) whether the evidence was sufficient to support the adverse jury verdicts; (6) objections to various evidentiary rulings; (7) objections to various jury instructions; (8) damages. We address each of defendants arguments in turn.

II.

RICO

The Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968 ("RICO"), was designed to prevent organized crime from gaining a stronghold in legitimate businesses. *Statement of Findings and Purpose*, Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, 922-23 (1970). The Act prohibits various forms of infiltration of legitimate business "enterprises" involved in interstate commerce through a "pattern of racketeering activity." 18 U.S.C. § 1962. Section 1964 of the Act provides for civil suits arising out of § 1962 RICO violations.

Standard of Proof

Defendants argue that civil RICO proceedings are quasi-criminal in nature, and that the court therefore should have imposed a higher standard of proof than a mere preponderance of the evidence. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), the Supreme Court left undecided the question of the proper standard of proof to be used in civil RICO cases. *Id.* at 491. Still, there is a strong suggestion in *Sedima* that the appropriate standard of proof in civil RICO is proof by a preponderance of the evidence. The court noted:

> We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard.

Id. Since *Sedima*, many lower courts have addressed the issue and have reached the conclusion that proof by a preponderance of the evidence is sufficient to establish a civil violation of section 1962. *See Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 531 (9th Cir. 1987); *Cullen v. Margiotta*, 811 F.2d 698, 731 (2d Cir.), *cert. denied*, 107 S. Ct 3266 (1987); *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 480-81 (5th Cir. 1986); *United States v. Local 560, Int'l Bhd. of Teamsters*, 780 F.2d 267, 279-80 n.12 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 2247 (1986); *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 1001 (D. Minn. 1986); *Bosteve, Ltd. v. Marauszwski*, 642 F. Supp. 197, 202 n.7 (E.D.N.Y. 1986); *Owl Constr. Co., Inc. v. Ronald Adams Contractor, Inc.*, 642 F. Supp. 475, 477 (E.D. La. 1986); *Platsis v. E.F. Hutton & Co.*, 642 F. Supp. 1277, 1309 (W.D. Mich. 1986); *Stainton v. Tarantino*, 637 F. Supp. 1051, 1070 (E.D. Pa. 1986).

The standard of proof in a given case "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). Because society has a deep interest in not imprisoning the innocent and because we recognize the stigma that attaches from a criminal conviction, we require the government to prove guilt beyond a reasonable doubt. *Id.* The requirement of proof beyond a reasonable doubt in a non-criminal case is extremely rare. *See In re Winship*, 397 U.S. 358 (1970) (juvenile delinquency adjudication requires proof beyond a reasonable doubt). *Winship* was based on the recognition that an accused in a juvenile delinquency proceeding faces the possibility of losing his or her liberty and the subsequent stigma of a criminal conviction. *Id.* at 367.

Defendants argue that, like delinquency adjudications, civil RICO is quasi-criminal. This contention is without merit. A civil RICO defendant does not face imprisonment, nor does the defendant suffer the collateral consequences associated with conviction of a criminal offense. While a civil RICO defendant does face the opprobrium of being labeled a "racketeer," it is not sufficiently stigmatizing to warrant criminal protections.[2] *See Sedima*, 473 U.S. at 492 ("As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings.")

The clear and convincing evidence standard is an intermediate standard of proof, requiring more than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt. It is used in civil cases in which more is at stake than mere loss of money. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418 (civil commitment); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350 (1960) (denaturalization). Under common law, allegations of fraud required proof of clear, cogent and convincing evidence, due to the fear that such claims could be fabricated easily. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 388 n.27 (1983). Many states, including Illinois, require allegations of fraud to be proven by clear and convincing evidence. *See, e.g., Nat'l Republic Bank of Chicago v. Nat'l Homes Construction Corp.*, 63 Ill. App. 3d 920, 381 N.E.2d 15 (1978). Defendants argue that since mail and wire fraud furnish the predicate acts for the RICO violations, plaintiff should have to prove its allegations by clear and convincing evidence. We believe the argument is foreclosed by the Supreme Court's reasoning in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). In *Huddleston*, the Supreme Court declined to require proof by

[2] For the same reasons, we find no error in the district court's denial of defendants' motion for all rights afforded criminal defendants.

clear and convincing evidence in a civil securities action based on fraud. The Court noted:

> The interests of defendants in a securities case do not differ qualitatively from the interests of defendants sued for violations of other federal statutes such as the antitrust or civil rights laws, for which proof by a preponderance of the evidence suffices. On the other hand, the interests of plaintiffs in such suits are significant. Defrauded investors are among the very individuals Congress sought to protect in the securities laws. If they prove that it is more likely than not that they were defrauded, they should recover.

Id. at 390. Although addressed to a different area of law, the reasoning of *Huddleston* is wholly applicable to the standard of proof issue in civil RICO cases. We can discern no reasoned basis for distinguishing a federal securities claim based on fraud from a civil RICO claim based on fraud as to warrant applying different standards of proof. Federal causes of action based on fraud which violates federal statutes are not to be governed by the State's standard of proof for common law fraud. The mere presence of a treble damages provision does not mandate otherwise. *See Ramsey v. United Mine Workers*, 401 U.S. 302 (1971) (preponderance standard governs civil antitrust actions). Accordingly, we find that proof by a preponderance of the evidence is sufficient for a finding of liability under civil RICO.

Pattern of Racketeering Activity

Defendants contend that the proven acts do not amount to a pattern of racketeering activity under RICO. Defendants were found liable under subsections 1962(a), (b), (c), and (d).[3] All subsections require the government to show

---

[3] § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of rack-

(Footnote continued on following page)

that defendants engaged in a pattern of racketeering activity. A pattern of racketeering activity requires at least two acts of racketeering activity within ten years. 18 U.S.C. § 1961(5). Racketeering activity includes mail and wire fraud, 18 U.S.C. §§ 1341, 1343. 18 U.S.C. § 1961(1). Plaintiff alleged that defendants engaged in a pattern of racketeering activity through fifty-seven separate acts of

---

[3] *continued*

eteering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, or use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (1)(a), (b), or (c) of this section.

mail and wire fraud over a seven month period,[4] injuring both Liquid Air and Bridges Weldings's unwitting competitor, Moore Welding.

In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), the Supreme Court noted that a pattern of racketeering activity required more than just two acts committed within a ten year period; the acts must have "continuity plus relationship which combines to produce a pattern." *Id.* at 496 n.14. Borrowing from another statute, the Court defined "pattern" as "criminal acts that have the same or similar purposes, results, participants, victims or other methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* Since *Sedima*, courts have wrestled with defining the concept of a pattern under RICO.

Some courts required the predicate acts be part of two separate schemes before a pattern could be shown, *see Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986); others had determined that a single scheme or episode was sufficient, *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986). In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), we opted for a "middle course between th[e] two extremes," requiring the predicate acts to be "ongoing over an identifiable period of time so that they can fairly be viewed as constituting separate transactions." *Id.* at 975. In determining whether the predicate acts are sufficiently continuous and related, we urged courts to examine the following factors: the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. *Id.* at 975. We noted however that "the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean

[4] Plaintiffs proved that the defendants prepared nineteen fraudulent returns. Each return resulted in two acts of mail fraud and one act of wire fraud.

that the acts automatically fail to satisfy the pattern requirement." *Id.* at 975-76. Thus, *Morgan* envisioned a fact-specific inquiry, in which no single factor would be determinative. *Marshall & Ilsey Trust Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987). In *Lipin Enter. v. Lee*, 803 F.2d 322 (7th Cir. 1986), however, we noted that a single fraudulent scheme with one injury to one victim was not transmuted into a federal case simply because it required several acts of mail and wire fraud to inflict the single injury. *Accord, Marks v. Pannell Kerr Forster*, 811 F.2d 1108 (7th Cir. 1987).

Plaintiffs allege that defendants defrauded two victims: Liquid Air and Moore Welding. Although setting Bridges up in business was undoubtedly part of the scheme (the payoff), Moore was not injured as a direct result of any of the predicate acts. Moore Welding was injured when D & R chose to pay Bridges by circumventing their non-competition agreement. Circumventing the agreement was not an alleged predicate act under RICO. Thus, for the purpose of establishing a pattern of racketeering activity, Moore Welding is not a victim. Therefore, we have a single scheme which lasted seven months and defrauded a single victim. The defendants committed nineteen separate acts, each resulting in use of the mails and use of the wire service. Each time an invoice was falsely prepared, it deprived Liquid Air of its entitlement to rent or replacement value. Therefore, each act resulted in a distinct injury to Liquid Air and a concommitant benefit to D & R. We find that the repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO. *Accord, Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987).

Sufficiency of the Evidence

The defendants argue that the evidence was insufficient to prove that D & R did not actually return the 3,307 cylinders missing from Liquid Air's Peoria facility. A jury verdict will be upheld "if a reasonable basis exists in the

record to support the verdict." *Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir. 1985). Defendants argue that Liquid Air used a flawed equation to determine that its paper inventory exceeded its actual inventory by more than 3,000. Testimony at trial showed that Liquid Air may not have counted "scrap" cylinders in assessing the actual inventory. Defendants postulate that the ignored "scrap" cylinders may have been cylinders returned from D & R that were later transferred to a different Liquid Air facility and "exchanged" for scrap cylinders. Defendants also argue that, according to their calculations, only 2,681 cylinders were not returned. Defendants merely present a plausible theory that the jury rejected. This is not a legitimate basis for overturning a jury verdict if the evidence was sufficient to support an opposing theory.

The jury had sufficient evidence to support its finding that D & R never returned 3,307 cylinders. Liquid Air employee Bud Sage testified extensively regarding his method of determining the number of stolen cylinders. Sage's calculations supported a determination that 3,307 cylinders were missing. Challenges to the calculations used go only to the weight to be accorded the testimony, a matter solely for jury determination.

In addition, the evidence was more than sufficient to show that D & R actually falsified the shipping orders. The evidence showed various irregularities associated with the orders documenting D & R returns supposedly made between November, 1982 and June, 1983. While prior to November, 1982, returns were signed only by D & R's regular drivers—and never by management—after November 1982, all but two return orders were signed by D & R management. In addition, the number of cylinders returned per order tripled during the period in question. No employee of either Liquid Air or D & R could be found who had seen any of these returns. Perhaps more importantly, defendants offered implausible explanations for these irregularities. The defendants testified that the returns were made when no other employees were around

(except Bridges). This was directly contradicted by Liquid Air's employee time records. Bridges then explained that, in fact, the deliveries were made on days other than the date on the order because the orders were prepared either later or earlier and either post-dated or predated accordingly. This explanation was itself contradicted by further evidence of employee time records and Liquid Air's (and Bridges's) policy of using the actual date on the order form. Defendants contradicted themselves and each other. From all this, the jury was entitled to infer that D & R had falsified return orders and had wrongfully retained the missing 3,307 Liquid Air cylinders.

Conspiracy

Defendants also challenge the jury's adverse finding with respect to the conspiracy count, section 1962(d). Defendants argue that there can be no *civil* liability based on conspiracy since there is no damage to plaintiff caused by the conspiracy alone. We need not reach either issue. The jury awarded $750,000 on each RICO count to be trebled. Were we to decide the conspiracy issues in defendants' favor, it would not lessen the amount of compensation they must pay. Accordingly, we decline to address either issue. *Cf. Spanish Action Comm. of Chicago v. City of Chicago*, 766 F.2d 315, 321 (7th Cir. 1985) (declining to consider plaintiffs' additional challenge where it would not increase amount of recovery).

Liability of Bridges Welding

Bridges Welding argues that it could not be liable for any RICO violation or for conversion since it did not have a corporate existence during the scheme. Bridges Welding was incorporated in April, 1983. Defendants' scheme was not completed until the end of May, 1983. Ray Bridges was a principal employee and president of Bridges Welding while still employed at Liquid Air. A corporation may

be a "person" under RICO.[5] 18 U.S.C. §§ 1961(3); *Haroco v. Am. Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). A corporation acts only through its agents. Under general agency rules, a corporation (principal) will be vicariously responsible for the wrongful acts of its employees (agents) when the acts are: (1) related to and committed within the course of employment; (2) committed in furtherance of the corporation; and (3) authorized or subsequently acquiesced in by the corporation. 10 W. FLETCHER, *Cyclopedia of the Law of Private Corporations*, § 4942 at 620-21. In falsifying returns, Ray Bridges acted as president of Bridges Welding and his acts redounded to the benefit of Bridges Welding shareholders. Bridges Welding accepted the benefits of Ray Bridges's wrongdoing. The jury was entitled to infer acquiescence.

Vicarious liability, however, has only limited application to civil RICO to avoid holding vicariously liable a corporation that was the *victim* of a RICO violation. *See Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982). To the extent that agency rules would require holding a legitimate, infiltrated business vicariously liable, the rules are at odds with the clear congressional intent to protect such legitimate businesses. *See Haroco*, 747 F.2d at 400. To accommodate these concerns, we have noted that the doctrine may apply only when 1) the corporation has derived some benefit from the RICO violation and 2) imposing vicarious liability is not inconsistent with the intent of Congress. To assess the intent of Congress we look to the express language of the particular subsections. *Id.* A RICO violation requires proof that a "person" (the defendant) acted with respect to an "enterprise" (the corporation) through a pattern of racketeering activity. If the language of the subsections

---

[5] § 1961. *Definitions*

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

require that the "person" and the "enterprise" be distinct entities, then we can postulate that Congress intended that "enterprises" not be held vicariously liable as defendants. In this regard, we have noted a distinction between subsections (a) and (c). Subsection (a) prohibits a person from investing money received from a pattern of racketeering in an enterprise engaged in interstate commerce. In *Haroco*, we noted that there was nothing in the language of subsection (a) that seemed to require that the liable "person" be a distinct entity from the "enterprise." In other words, subsection (a), by its express language, encompassed circumstances under which the enterprise itself was guilty of wrongdoing. Thus, vicarious liability under subsection (a) is consistent with congressional intent, provided the corporation derived some benefit from the RICO violation.

In contrast, the express language of subsection (c) has been read to proscribe vicarious liability. *Haroco*, 747 F.2d at 400; *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982). Subsection (c) prohibits an employee of an enterprise from operating the enterprise through a pattern of racketeering activity. We noted in *Haroco* that the language of subsection (c) clearly envisioned that the "person" (employee) and "enterprise" (employer) be different entities. *Accord Petro-Tech, Inc. v. Western Co. of N. Am.*, No. 86-3361, slip op. (3d Cir. July 13, 1987) (finding that subsection (c) was intended to govern only those situations in which the enterprise was the passive, innocent victim of RICO). Thus, vicarious liability should not be imposed under subsection (c) when a finding of liability would require the "person" and "enterprise" to be the same entity.

Subsection (b) prohibits a person from acquiring an interest in an enterprise through a pattern of racketeering activity. Whether a single entity may be both a liable "person" and an "enterprise" under subsection (b) depends on whether the language of subsection (b) is more like (a) or (c). In *Bruss Co. v. Allnet Communication Services, Inc.*, 606 F. Supp. 401 (N.D. Ill. 1985), the court

found that subsection (b), like subsection (c), required that the "person" and "enterprise" be distinct, reasoning that (b) requires the person to "acquire or maintain" an interest in an enterprise—similar to the requirement of subsection (c) that the person be "employed by" an enterprise. We disagree. Subsection (a), which requires a person to invest income in an enterprise, does not require a separate entity for the "person" and the "enterprise." *See Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397, (7th Cir. 1985). We can see no distinction between "investing in an enterprise" and "acquiring an interest in an enterprise" sufficient to require separate entities for a subsection (b) violation. Unlike subsection (c), which requires a *relationship* between the "person" and the "enterprise" (employer-employee), subsections (a) and (b) require only the *use* of an "enterprise" by a "person." Accordingly, we hold that, like subsection (a), subsection (b) does not require the existence of an enterprise separate and distinct from the person sought to be held liable. *Accord, Wilcox*, 815 F.2d at 529.

Respondeat superior is therefore entirely appropriate under both subsections (a) and (b), so long as Bridges Welding derived a benefit from the violations. There is substantial evidence that Bridges Welding benefitted from the RICO violation. In exchange for the "work" of Bridges Welding's president, D & R supplied Bridges Welding with the labor of defendant Rogers's son and defendant Michlik's nephew. A supplier of Bridges Welding, Gano Welding, billed D & R for supplies furnished to Bridges Welding. In addition, there was evidence of various "loans" from D & R to Bridges Welding on which D & R was, at best, not actively pursuing collection. Therefore, under both (a) and (b), Bridges Welding was properly found liable.

Again, since addressing the propriety of the finding of vicarious liability under subsections (c) (under which *respondeat superior* may not apply) or (d) (conspiracy to violate (a), (b), or (c)), would not affect the amount of Liquid Air's award, we decline to consider defendants' chal-

lenges to these findings. *Cf. Spanish Action Comm.*, 766 F.2d at 321.

III.

EVIDENTIARY RULINGS

Defendants maintain that the trial court prevented them from presenting their theory of defense. Defendants sought to convince the jury that no fraud had in fact occurred and that Liquid Air brought suit only to remove a new competitor (D & R) from the market. Defendants complain that the court excluded evidence that showed that Liquid Air had offered to finance an attempted "buy out" of a D & R competitor and that Liquid Air had divulged business secrets of D & R, revealed during discovery, in contravention of a stipulation not to reveal such information. Defendants argue that these pieces of evidence would show Liquid Air's general malevolence toward D & R and Liquid Air's desire to drive D & R out of business.

The trial court has broad discretion in determining whether proffered evidence should be admitted or excluded. *See, e.g., United States v. Garver*, 809 F.2d 1291, 1297 (7th Cir. 1987). Had the court admitted the excluded evidence, it would not be especially probative of the allegation that Liquid Air's true motives in bringing the suit were solely malevolent and that no fraud had occurred. The court excluded evidence of the alleged discovery abuse because the documents were not listed in the pretrial order, nor had the court been informed of them at any time prior to the proffer. In addition, the proffered evidence would delay the proceedings, requiring trial counsel's testimony and possibly substitution of counsel. We find no abuse of discretion in the court's determination that the relevance of the evidence was outweighed by the danger of confusion and undue delay. FED. R. EVID. 403.

Defendants next object to the testimony of Gregory Alexander. Alexander was Liquid Air's comptroller and testified to the fair market value of the cylinders as a

basis for the jury's award on the conversion count.[6] Defendants argue that Alexander was not sufficiently qualified to give expert testimony on the matter. In admitting expert testimony under FED. R. EVID. 702, the trial judge has broad discretion and the determination will be affirmed unless it is "manifestly erroneous." *United States v. Lundy*, 809 F.2d 392, 394 (7th Cir. 1987); *see also United States v. Davis*, 772 F.2d 1339, 1343-44 (7th Cir.), *cert. denied*, 106 S. Ct. 603 (1985).

As comptroller, one of Gregory Alexander's duties was to determine the value of cylinders to be acquired, both new and used. The defendants objected to Alexander's qualifications because he did not explain the procedures he used to determine market value nor the geographic locality of his expertise. The district court ruled that plaintiff had established an adequate foundation, and that any questions regarding Alexander's methodology or particular area of expertise were more appropriately addressed during cross-examination. This was hardly error. Experience and knowledge establish the foundation for an expert's testimony; the accuracy of such testimony is a matter of weight and not admissibility. *See Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729, 739 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105 and 459 U.S. 1204 (1983).[7]

IV.

JURY INSTRUCTIONS

Next, defendants object to various jury instructions given by the district court. Defendants contend that the

---

[6] As opposed to the RICO counts, damages for conversion are properly limited to the fair market value of the converted items. *People v. Rose*, 19 Ill. 2d 292, 166 N.E.2d 566 (1960).

[7] Defendants also object to the trial court's refusal to allow defendants to explain the treble damage provision of RICO to the jury. Such information is irrelevant to a jury's deliberations and may confuse or prejudice the jury. It is properly excluded. *Cf. Heatransfer Corp. v. Volkswagenwerk A.G.*, 553 F.2d 964 (C.A. Tex. 1977), *cert. denied*, 434 U.S. 1087.

trial court's instructions defining "pattern of racketeering activity" and "association-in-fact" were erroneous. In addition, defendants object to the court's failure to administer special interrogatories offered by the defendants.

In judging a challenge to a particular jury instruction, we must determine only whether the instructions overall, conveyed the "correct message" to the jury. *Wilk v. Am. Medical Ass'n*, 719 F.2d 207, 218-19 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984). The trial judge informed the jury that in order to find a "pattern of racketeering activity," it must find,

> [t]wo or more acts of racketeering activity which were related by a common scheme, plan or motive. It may not simply be a series of disconnected acts. Therefore, proof of two acts of racketeering activity, without more does not establish a pattern.

The instruction comports with the general requirements of the statute as interpreted since *Sedima*. Defendants object because the charge failed to advise the jury that there be "some continuing threat of racketeering activity." Defendants argue that the continuity requirement of *Sedima* mandates that there be a threat that defendants would engage in future acts of racketeering after completion of their scheme. This is an untenable interpretation of the requirement of continuity. The requirement of continuity was not intended to force a court to guess the likelihood of future criminal conduct nor was it intended to proscribe liability for completed schemes. Continuity refers instead to the duration of the predicate acts. The trial court was correct in refusing the proffered instruction.

Defendants next contend that the jury was not instructed that it must find the existence of an enterprise before imposing liability. We find defendants' objections obtuse. As to each RICO count, the court instructed the jury regarding each element of the subsection, including the enterprise requirement. The jury was instructed that it had to find that defendants had used income derived from

a pattern of racketeering to invest in an enterprise (subsection a); acquired an interest in an enterprise through a pattern of racketeering (subsection b); and conducted the affairs of an enterprise through a pattern of racketeering (subsection c). Apparently, defendants object to the court's failure to specifically instruct the jury that it must find the existence of an enterprise. It is not necessary to give a proposed instruction "where the essential points are covered in another instruction." *United States v. Hansen*, 701 F.2d 1215, 1218 (7th Cir. 1983). The instructions, as given, adequately informed the jury that the existence of an enterprise was essential to civil RICO liability.

Defendants also claim as error the court's failure to administer special interrogatories proffered by defendants. Although initially expressing an interest in administering special interrogatories, the trial court determined that they were not necessary in light of cautionary instructions already given. When the court made this determination, defendants made no argument to enlighten the trial court regarding the necessity of special interrogatories, even in light of the cautionary instructions given; nor do they make such argument here. Simply voicing a general objection is not sufficient. To preserve for review the issue of whether special interrogatories were required, defendants would have to have argued the issue below with specificity. *See Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 933 (1987). Their failure to specify on appeal how the failure to administer special interrogatories prejudiced them compounds their error. We have considered the remainder of defendants' challenges to the jury instructions and find them to be similarly frivolous.

V.

DAMAGES

Defendants challenge the jury's damage awards on several bases, many of which are frivolous and will not be addressed here. The remaining challenges are: (1) that the

appropriate measure of damages for the RICO counts was only the fair market value of the cylinders and not contractual damages; (2) that the measure of damages for inducement to breach a fiduciary duty should be limited to the disloyal employees's wages and benefits during the fraud; (3) that the award of prejudgment interest was improper; and (4) that the court should have subtracted any set-offs prior to trebling the awards.

Appropriate Measure of Damages Under RICO

Plaintiff was awarded $750,000 on each RICO count to compensate it for both the replacement value and the lost rental value of the cylinders. The court allowed the jury to determine the appropriate measure of compensation by looking to the contract between Chemtron Corporation (the predecessor in interest to Liquid Air) and Decatur Oxygen Products, Inc. (a wholly owned subsidiary of D & R), which provided that D & R would pay Liquid Air rent on all cylinders until they were returned or accounted for, and that D & R would pay Liquid Air the replacement value for any cylinders not returned. Defendants argue that contract damages were inappropriate and that under civil RICO, a court must look to the underlying nature of the predicate acts to determine the proper measure of damage. Since the underlying claim here is conversion, defendants argue, under Illinois law the appropriate measure of damages is only the fair market value of the cylinders. We have noted how futile it can be to employ a case-by-case approach in determining the "underlying" cause of action in civil RICO. *See Tellis v. United States Fidelity & Guaranty Co.*, 805 F.2d 741 (7th Cir. 1986), *vacated*, 55 U.S.L.W. 3871 (1987). Although defendants now insist that the "underlying" cause of action is conversion, they insisted as strongly that the "underlying" cause of action was fraud in arguing for a "clear and convincing" standard of proof.

The measure of damages under civil RICO is the harm occasioned as a result of the predicate acts. *Sedima*, 473 U.S. at 497. A plaintiff injured by civil RICO violations

deserves a "complete recovery." *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985). Although the contract only bound D & R and Liquid Air, the damages provided therein supply an appropriate measure of the degree to which Liquid Air was injured by the RICO violations. To restrict damages to the fair market value of the cylinders would deprive Liquid Air of its rights under the contract and would not compensate it for its losses. The damages that Liquid Air was entitled to under its contract with D & R provide the appropriate measure of full compensation.

Lost Rent

Defendants then challenge the jury's award of lost rent, also provided for in the contract. Defendants equate lost rent with lost profits and note that Illinois does not allow recovery for lost profits in contract actions. The argument ignores the obvious distinction between lost rent and lost profits. Lost profits are not recoverable simply because they are speculative. The rent awarded was that due and owing at the time of conversion, and easily calculable. It was entirely appropriate to award lost rent.

Set-off

Plaintiffs first learned during discovery that D & R retained some Liquid Air cylinders. At that time, Liquid Air sought a protective order over the cylinders (then thought to number around 200) to ensure their preservation. After post-trial motions were denied, defendants revealed that they had 530 Liquid Air cylinders, and sought to return them and accordingly set-off the judgment. The rental and replacement value of the belatedly returned cylinders was subtracted from the already trebled damages. Defendants argue that the cost of the returned cylinders should have been subtracted before trebling.

While the return of the cylinders may compensate Liquid Air for the replacement value of the cylinders, it does not compensate it for rents lost prior to litigation. More

importantly, it does not negate the frauds perpetrated by defendants. We conclude that setting-off damages *after* trebling is more likely to effectuate the purposes behind RICO.[8] *See, In re Nat'l Mortgage Equity Corp.*, 636 F. Supp. 1138, 1151 (C.D. Cal. 1986); *cf. Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.) *cert. denied*, 355 U.S. 835 (1957) (subtracting set-off after trebling in antitrust case).

The judgment entered on the jury verdict and award of damages is affirmed in all respects.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[8] Defendants challenge the treble damages provision of RICO as violative of the Eighth Amendment's proscription against excessive fines. The argument has been flatly rejected with respect to antitrust treble damages. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404, 440 (S.D.N.Y. 1979), *rev'd on other grounds*, 603 F.2d 263 (2d Cir. 1979). The same reasoning applies here. Although there is some sense in which RICO treble damages are punitive, they are largely compensatory in the special sense that they ensure that wrongs will be redressed in light of the recognized difficulties of itemizing damages. *See Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1983).

APPENDIX B

JUDGMENT—ORAL ARGUMENT
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 13, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

Nos. 86-3001 and 86-3046

LIQUID AIR CORPORATION, a Delaware corporation,
Plaintiff-Appellee,

vs.

JACK R. ROGERS, GOERGE MICHLIK, and D & R WELDING SUPPLY COMPANY, an Illinois Corporation, and RAYMOND E. BRIDGES and BRIDGES WELDING SUPPLY & THERAPY, INC.,
Defendants-Appellants.

Appeals from the United States District Court for the Central District of Illinois, Peoria Division.

No. 84 C 1110
MICHAEL M. MIHM, Judge

This cause was heard on the record from the United States District Court for the Central District of Illinois, Peoria Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 10, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

Nos. 86-3001 &
86-3046

LIQUID AIR CORPORATION,
Plaintiff-Appellee,

vs.

JACK R. ROGERS, GEORGE MICHLIK and
D & R WELDING SUPPLY COMPANY, an Illinois Corporation,
and
RAYMOND E. BRIDGES and
BRIDGES WELDING SUPPLY & THERAPY, INC.,
Defendants-Appellants.

Appeals from the United States District Court for the Central District of Illinois, Peoria Division.

No. 84-1110
MICHAEL M. MIHM, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause by Defendants-Appellants Jack R. Rogers, George Michlik and D & R Welding Supply Company, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

In addition, this court's opinion of November 13, 1987, is hereby amended as follows:

Page 2, line 14 should read: "D & R is an Illinois corporation in which two of the shareholders are Jack R. Rogers and George Michlik."

On page 8, in the last sentence of the text, replace "government" with "plaintiff".

IT IS SO ORDERED.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 10, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

No. 86-3001 and
86-3046

LIQUID AIR CORPORATION,
Plaintiff-Appellee,

vs.

JACK R. ROGERS, GEORGE MICHLIK and D & R WELDING SUPPLY COMPANY, an Illinois Corporation, and RAYMOND E. BRIDGES and BRIDGES WELDING SUPPLY & THERAPY, INC.,
Defendants-Appellants.

Appeals from the United States District Court for the Central District of Illinois, Peoria Division.

No. 84-1110
MICHAEL M. MIHM, *Judge.*

ORDER

This matter comes before the court for its consideration of the "Motion to Correct Clerical Mistake in Second

Amended Final Judgment" filed herein on June 1, 1987, by counsel for the plaintiff-appellee. On consideration thereof,

IT IS ORDERED that said motion is GRANTED whereas those corrections have been considered and reflected in this court's opinion decided on November 13, 1987.

APPENDIX E

United States District Court
CENTRAL DISTRICT OF ILLINOIS

84-1110

LIQUID AIR CORPORATION
v.

RAYMOND E. BRIDGES, JACK R. ROGERS, GEORGE MICHLIK, BRIDGES WELDING SUPPLY & THERAPY, INC. and D & R WELDING SUPPLY CO.

SECOND
AMENDED
JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Judgment entered August 1, 1986 is amended to the following amounts:

Count I	$2,168,062.00
Count II	$2,168,062.00
Count III	$2,168,062.00
Count IV	$2,168,062.00
Count V	$ 347,444.40
Count VI	$ 0.00
Count VII	$ 668,062.00

This amended judgment under Counts I through IV reflects the damages award after trebling, as amended by this Order, pursuant to a Second Amended Judgment Order entered on November 14, 1986.

FILED
NOV 17 1986

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

November 17, 1986

JOHN M. WATERS
Clerk

/s/ LEONARD D. BROWN
(By) Deputy Clerk Leonard D. Brown

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 84-1110

LIQUID AIR CORPORATION, a Delaware corporation,
Plaintiff,

v.

RAYMOND BRIDGES, et al.,
Defendants.

SECOND AMENDED JUDGMENT ORDER

FILED
NOV 14 1986

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

This matter coming on to be heard upon the Order of this Court of October 14, 1986, directing the parties to determine the number of Liquid Air-owned cylinders held by Defendant D & R Welding, Inc. during the pendency of this cause and further directing said Defendant to return those cylinders to Plaintiff; and it being represented to the Court that those cylinders, numbering 530, have been returned,

IT IS HEREBY ORDERED that:

The judgment entered August 1, 1986, is amended to reflect a set off for the return of 530 cylinders by the D & R Defendants to Liquid Air corporation and is hereby made final. The judgment is also amended to reflect the amount of prejudgment interest which the Court granted on Count V in its Order of November 13, 1986. The judg-

ment under each Count is amended to the following amounts:

Count I	$2,168,062.00
Count II	$2,168,062.00
Count III	$2,168,062.00
Count IV	$2,168,062.00
Count V	$ 347,444.40
Count VI	$ 0.00
Count VII	$ 668,062.00

The set-off is based on a cylinder value of $154.60 per cylinder under Counts I through IV and VII and $108.22 per cylinder under Count V.

The amended judgment under Counts I through IV reflects the damages award after trebling, as amended by this Order.

The Clerk is directed to enter an amended judgment, final as of the date of its entry, which reflects the amounts as amended above.

It is so ordered this 14th day of November, 1986.

/s/ MICHAEL M. MIHM
Michael M. Mihm
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS PEORIA DIVISION

No. 84-C-1110

LIQUID AIR CORPORATION, a Delaware corporation,
Plaintiff,

-VS-

RAYMOND E. BRIDGES, JACK R. ROGERS, GEORGE MICHLIK, BRIDGES WELDING SUPPLY & THERAPY, INC., an Illinois corporation, D & R WELDING SUPPLY COMPANY, an Illinois corporation,
Defendants.

COURT DOCKET CONTINUATION PAGE 18, ENTRY DATED OCTOBER 14, 1986

Parties pres.by/c. via phone for Hearing on Post Trial Mots. Argument by/c. (#218 & #201)-Mots. DENIED in part & GRANTED in part. Magistrate's Order of 5/6/85 is VACATED. Parties are directed to determine the # of cylinders & return them by 10/17/86 & counsel to submit by 10/22/86, a joint proposed 2nd amended judgment. 2nd Am. Judgment will be final upon its entry by Clerk. Atty. McNutt to reply to P.MO for Attys. fees & costs by 10/28/86. Counsel to confer re: how long hearing on P.MO for Attys. fees & costs will take and to notify Holly by 10/28/86 for scheduling of hearing on same. Oral mo. by all defts. to extend time to file certain documents—MO GRANTED until 10/17/86. (copy of docket sheet sent to atty. Howard by Clerk) (Mihm,J)

Excerpts from Trial Transcript dated October 14, 1986, Volume 20, Trial Court Docket No. 247

Page 4:

THE COURT: Okay, that's fine. Let's get into the post-trial motions then, defendants' motions. Who is going to go first?

* * * *

Page 26-28:

THE COURT: This is Judge Mihm speaking. Can you all hear me? First of all, Mr. McNutt I believe started out his argument by indicating that the Court had not actually had the opportunity to rule—or ruled on the question raised in terms of the failure of the plaintiff to prove the cylinder loss. I think that the record does reflect at other points in the proceeding that by the denial of defendants' motions to various points that that was a question for the jury to decide and they did decide it. In a few moments here I will be getting into specifically the question of the reduction of the amount of cylinders that is claimed by the defendants.

In terms of the counting of the cylinders, as to the junked cylinders, scrapped cylinders, my memory from the record is that it was the position of the plaintiffs that junked cylinders were not included on any inventory that was kept. And, of course, I think it is fair to say that the defendants argued that there may well have been some crossover between junked cylinders and non-junked cylinders. And it seems to me that was a question of fact for the jury to decide. Concerning this question of the statements made by Mr. Schopf in closing statement, I don't think that statement or those statements that are claimed to have been made really change anything. The Court has added up the number of cylinders that appear on Plaintiff's

Exhibit No. 1. I did it very quickly, and so it may not be one-hundred percent accurate. But the figure that I came up with was 5,176, which is certainly in the ballpark of what was under discussion and the statements made by Mr. Schopf in terms of reductions from that don't seem in any way to be inconsistent with the plaintiff's position in the case or in the award that was made by the jury.

As to the $4,000 award against Mr. Bridges on the breach of fiduciary duty, I think in order to consider the implications of that one has to look at all of the verdicts that were returned. Mr. Bridges was a co-defendant with the other defendants in the earlier counts that dealt with the same subject matter—that is, the cylinders. And in every one of those other counts the award of the jury was the same; that is, $750,000.00, which is made up of the lost cylinders and the lost rental, if you want to call it that. I certainly can't say specifically what was in the mind of those jurors when they set that award in the amount of $4,000.00. But I don't think there is anything in that award in that particular count that as a matter of law creates verdicts that are inconsistent to the point where either some type of remittor [sic] or new trial would be required. It may well be, as the plaintiffs argued, that they felt sorry for him and since he was the only person named in that count that they chose that opportunity to reflect that, but that is speculation also.

The argument that the lost rents were not a valid barometer or component of damages, it seems to me that we went through this during the trial and I believe I recall in finding at that time that certainly it wasn't necessarily the one that the jury would accept or it didn't necessarily limit the plaintiffs to argue for other types of damages but that since the contract itself between the parties established that as a measure of damages that it was an appropriate measure of damages for the jury to consider, and I still feel that way.

As to the 259 cylinders that are presently in the possession of the defendant, it seems to me that the simple thing to do as to those cylinders would be to take that number and multiply it times 108. Is that the plaintiff's figure, 108?

* * * *

Page 32:

THE COURT: The bottom line on all of this is that with the exception of the reduction reflecting the 259 cylinders, that all of the post-trial motions are denied.

* * * *

Page 32-33:

THE COURT: I would suggest this: I had indicated that this order of the Court would be final as of today and that the time for appeal would start running today. But it seems to me that this question has got to be resolved before it can be put to rest. So I would suggest that as quickly as possible to determine the number of cylinders and return them and so that the number returned is confirmed, and then at that point I would ask counsel to tender to the Court hopefully a joint proposed amendment to the judgment. That's without defendants having waived any of your objections previously made. But tender suggested wording to the Court on a modified judgment. Then when I get that I will enter it and then the judgment would become final as of that date.

* * * *

Excerpts from Trial Transcript dated November 14, 1986, Volume 21, Trial Court Docket No. 265.

* * * *

Page 3:

THE COURT: Yes, we will set a date before you leave today. I would like to discuss this setoff question first and resolve that. I think I have read all the pleadings in the cases cited. I would be happy to consider very brief oral argument on that.

* * * *

Page 13:

THE COURT: Well, I appreciate the arguments. As I said, I think it is not a very clear question, not easy to resolve. But as I said, my heart is with the defendant, but my head is with the plaintiffs. I believe that the defendant—or the plaintiff's arguments on this most accurately state the law. So the setoff will occur after the trebling. It will also apply to Count VI, which I guess will have the effect of reducing that to zero, right?

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 84-1110

LIQUID AIR CORPORATION, a Delaware Corporation,
Plaintiff

-vs-

RAYMOND E. BRIDGES, JACK R. ROGERS, GEORGE MICHLIK, GEORGE [SIC] BRIDGES WELDING SUPPLY & THERAPY, INC., an Ill. Corp. and D & R WELDING SUPPLY CO., an Ill. Corp.

Defendants.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff is entitled to Attorney's Fees and Costs, and Judgment is hereby entered in favor of Plaintiff and against all Defendants for the sums of $378,170.58 for attorney's fees and $51,412.17 for costs, through December 16, 1986; this Judgment entered pursuant to Stipulation filed herein December 16, 1986.

FILED
DEC 18 1986

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

December 18, 1986

JOHN M. WATERS
Clerk

/s/ LEONARD D BROWN
(By) Deputy Clerk LEONARD D. BROWN

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS PEORIA DIVISION

No. 84-1110
Judge Mihm

LIQUID AIR CORPORATION, a Delaware corporation,
Plaintiff,

-vs-

RAYMOND E. BRIDGES, JACK R. ROGERS, GEORGE MICHLIK, BRIDGES WELDING SUPPLY & THERAPY, INC., an Illinois corporation, D & R WELDING SUPPLY COMPANY, an Illinois corporation,

Defendants.

FILED
DEC 16 1986

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

12-16-86 Stipulation allowed Clerk to enter Judgment in the amounts stipulated. /s/ MMM

STIPULATION CONCERNING ATTORNEY'S FEES AND COSTS

Plaintiff Liquid Air Corporation and defendants Raymond E. Bridges, Jack R. Rogers, George Michlik, Bridges Welding Supply & Therapy, Inc. and D & R Welding Supply Company, by their respective undersigned attorneys, hereby stipulate as follows concerning Plaintiff's Petition for Attorney's Fees and Costs:

1. Plaintiff Liquid Air Corporation, is the prevailing party at trial on its claims for violations of RICO and for conversion, breach of fiduciary duty and inducement to

breach of fiduciary duty. As the prevailing party Liquid Air Corporation is entitled to its reasonable attorney's fees pursuant to 18 U.S.C. §1964(c) and to its costs pursuant to 18 U.S.C. §1964(c) and Rule 54(d) of the Federal Rules of Civil Procedure.

2. Plaintiff's reasonable attorney's fees through December 16, 1986, are $378,170.58.

3. Plaintiff's reasonable costs through December 16, 1986, are $51,412.17.

4. Nothing in this stipulation shall be deemed a waiver or restriction of plaintiff's right to seek or receive reasonable attorney's fees and costs on appeal.

5. In the event that the judgment under any of the RICO claims is affirmed, in whole or in part, on appeal, defendants shall be liable to pay to plaintiff $378,170.58 in attorney's fees, exclusive of any attorney's fees on appeal which the Court may award pursuant to 18 U.S.C. §1964(c).

6. In the event that the judgment under any of the claims is affirmed, in whole or in part, on appeal, defendants shall be liable to pay to plaintiff (in addition to any attorney's fees as provided for in paragraph 5) $51,412.17 in costs, exclusive of any appeal costs which the Court may award.

/s/ PAULA E. LITT

One of the Attorneys for Plaintiff
Liquid Air Corporation

/s/ FRANK H. BYERS II

One of the Attorneys for Defendants
Jack R. Rogers, George M. Michlik,
and D&R Welding Supply Co.

/s/ WILLIAM A. MCNUTT

Attorney for Defendants
Raymond E. Bridges and Bridges
Welding Supply & Therapy, Inc.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. §§1961, 1962, 1963 AND 1964 RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT

§1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.]—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave

traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS § 186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS § 501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States,

a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlaw-

ful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962 [18 USCS § 1962], and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 [18 USCS § 1962].

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provision of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs

or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter [18 USCS §§ 1961 et seq.] by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the

United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

INDEX TO THE TRIAL TRANSCRIPT

V.1: Friday, April 25, 1986, Trial Court Docket No. 154,p.p.1-46 (argument Renewed Motion for Summary Judgment).

V.2: Monday, June 30, 1986, Trial Court Docket No. 291,p.p.1-50 (preliminary trial matters; Motions in Limine, etc.).

V.3: Tuesday, July 1, 1986, Trial Court Docket No. 198,p.p.1-56 (preliminary instructions; legal arguments).

V.4: Tuesday, July 1, 1986, Trial Court Docket No. 292,p.p.1-50 (opening statements).

V.5: Tuesday, July 1, 1986, Trial Court Docket No. 199,p.p.1-143 (Sage).

V.6: Wednesday, July 2, 1986, Trial Court Docket No. 199A,p.p.1-34 (legal arguments).

V.7: Wednesday, July 2, 1986, Trial Court Docket No. 293,p.p.1-107 (Sage; McCaw).

V.8: Monday, July 7, 1986, Trial Court Docket No. 294,p.p.1-20 (Motion for Continuance).

V.9: Wednesday, July 9, 1986, Trial Court Docket No. 219,p.p.1-277 (McCaw; Bridges).

V.10: Thursday, July 10, 1986, Trial Court Docket No. 220,p.p.1-281 (Bridges; Stanfield; Michlik; Pennypacker).

V.11: Friday, July 11, 1986, Trial Court Docket No. 221,p.p.1-240 (Kimberlin; Smith; McGlaughlin; Alexander; Miller; Elliott; Helle).

V.12: Saturday, July 12, 1986, Trial Court Docket No. 222,p.p.1-240 (J.D. Rogers; Gilmore; Gano; Miller; C.Bridges; B.Koontz; Dunn).

V.13: Monday, July 14, 1986, Trial Court Docket No. 223,p.p.1-236 (Northcutt; Bauer; Wilder; Haynes; Zeilman; Lacox; Wiggins).

V.14: Tuesday, July 15, 1986, Trial Court Docket No. 224,p.p.1-189 (Strate; J.R. Rogers).

V.15: Wednesday, July 16, 1986, Trial Court Docket No. 226,p.p.1-27 (McCaw).

V.16: Wednesday (mislabeled "Tuesday"), July 16, 1986, Trial Court Docket No. 225,p.p.1-52 (jury instructions conference).

V.17: Wednesday (mislabeled "July 10, 1986"), July 16, 1986, Trial Court Docket No. 295,p.p.1-134 (jury instructions conference).

V.18: Thursday, July 17, 1986, Trial Court Docket No. 296,p.p.1-175 (jury instructions conference).

V.19: Friday, July 18, 1986, Trial Court Docket No. 242,p.p.1-178 (closing argument; verdict).

V.20: Tuesday, October 14, 1986, Trial Court Docket No. 247,p.p.1-37 (argument on post-trial motions).

V.21: Friday, November 14, 1986, Trial Court Docket No. 265,p.p.1-71 (hearing on motions).

V.22: Friday, July 11, 1986, Trial Court Docket No. 363,p.p.3-14 (Alexander).

No. 87-1262

Supreme Court, U.S.
FILED
MAR 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

JACK R. ROGERS, GEORGE MICHLIK and D & R WELDING SUPPLY COMPANY, an Illinois Corporation, and RAYMOND E. BRIDGES and BRIDGES WELDING SUPPLY & THERAPY, INC.,

Petitioners,

v.

LIQUID AIR CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM G. SCHOPF, JR.*
PAULA E. LITT
SCHOPF & WEISS
304 West Randolph Street
Chicago, Illinois 60606
(312) 701-9300

Attorneys for Respondent Liquid Air Corporation

**Counsel of Record*

PARTIES

The caption of the case in this Court contains the names of all parties. Excluding wholly-owned subsidiaries, the following are subsidiaries of respondent Liquid Air Corporation: Kent Oxygen Company, Inc.; National Compressed Gases, Inc.; Nuclear Cryogenics, Inc.; Southland Welding Supply, Inc.; Argonal Inc.; Hydrogenal Inc.; Hydrogenal II Inc.; Miller Welders Canada Ltd.; Canadian Helium Ltd; Oxygene St.-Maurice (1983) Ltee.; and 118639 Canada Inc. The following are affiliates of respondent Liquid Air Corporation: Temple Welding Supply & Equipment Inc.; Oxychem U.S.A.; U.S. Divers Corp.; Lipha Chemicals Inc.; Lipha Pharmaceuticals Inc.; Dey Laboratories Inc.; Oxychem Canada Inc.; Lincoln Big Three, Inc.; and Big Three Lincoln U.K.

TABLE OF CONTENTS

	Page
Parties	i
Table of Authorities	iii
Statement of the Case	1
1. The Facts	1
The Relationship of the Parties	1
D & R's "Returns" and the Scheme's Inception	2
How the Scheme Worked	3
Uncovering the Scheme	4
Proof of the Fraud	5
2. Proceedings Below	7
Argument	8
I. The Seventh Circuit Correctly Held That Petitioners' Conduct Constituted a Pattern of Racketeering Activity as Defined Under RICO	8
II. Petitioners' Other Arguments Do Not Present Issues Worthy of Review by This Court	10
Conclusion	12

TABLE OF AUTHORITIES

Cases: *Page*

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 11

Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475 (5th Cir. 1986) 10

Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978), *revs'd in part on other grounds*, 603 F.2d 263 (2d Cir. 1979) 11

Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987), *cert. denied*, 107 S.Ct. 3266 (1987) 10

H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987) 10

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 10

Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986) 8-9

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985) 8, 11

Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986) 9-10

United States v. Local 560 of the Int'l Brotherhood of Teamsters, 780 F.2d 267 (3d Cir. 1985) 10

Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522 (9th Cir. 1987) 10

Statutes:

18 U.S.C. § 1961(5) 8

In The

Supreme Court of the United States

October Term, 1987

JACK R. ROGERS, GEORGE MICHLIK and D & R WELDING SUPPLY COMPANY, an Illinois Corporation, and RAYMOND E. BRIDGES and BRIDGES WELDING SUPPLY & THERAPY, INC.,

Petitioners,

v.

LIQUID AIR CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

1. The Facts

The Relationship of the Parties

Respondent Liquid Air Corporation ("Liquid Air") produces and distributes industrial gas and industrial

gas products. These products are supplied to customers by distributors who lease cylinders from Liquid Air. Distributors pick up full cylinders of industrial gas from their designated Liquid Air distribution center and return empty cylinders there. Pet. App. 2a.[1]

Petitioner D & R Welding Supply Co., Inc. ("D & R"), was a Liquid Air distributor for over 30 years. D & R, which is operated by its principal shareholders, petitioners Jack R. Rogers ("Rogers") and George Michlik ("Michlik"), has branches in Decatur, Streater, and Urbana, Illinois and is engaged in interstate commerce. Pet. App. 2a.

In August 1980 D & R notified Liquid Air that it wished to terminate its distributorship effective in September 1981. Under its Distributor Cylinder Lease Agreement with Liquid Air, upon termination D & R was required to return all leased cylinders to Liquid Air, pay rent on all cylinders until they were returned or accounted for, and pay Liquid Air the replacement value for cylinders not returned or accounted for. The rental price in effect at the time D & R terminated its contract was $2.25 per cylinder per month and the average replacement value per cylinder was $150. When it terminated the agreement, D & R had over 5,000 cylinders outstanding on its lease. Pet. App. 2a.

D & R's "Returns" and the Scheme's Inception

Although D & R was to begin returning cylinders to Liquid Air in September 1981, it did not begin making significant cylinder returns until April 1982 – and then only after Lauren "Bud" Sage ("Sage), Liquid Air's Midwest Regional Manager of Sales and Distribution, requested that D & R do so. Returns were steady for a while, but then began to taper off in the fall of 1982. By August 1982,

---

[1] The Appellate Court's opinion is reproduced in the Appendix to the Petition for Writ of Certiorari, and shall be cited herein by appendix page as, *e.g.*, "Pet. App. 10a-11a." The Petition for Writ of Certiorari shall be cited herein by page as *e.g.*, "Pet. 4."

D & R had returned only 1,570 cylinders. To expedite the sluggish returns, Liquid Air increased the cylinder rental rate it was charging D & R for outstanding cylinders. Pet. App. 2a.

The rent increase in the fall of 1982 created a business problem for Rogers, Michlik and D & R, since it put pressure on D & R to reduce its lease balance quickly. D & R solved this problem with the aid of Liquid Air employee Raymond E. Bridges ("Bridges"), then Distribution Supervisor for the Peoria Distribution Center. As distribution supervisor, Bridges was responsible for the total operation of the Peoria facility. Rather than return the remaining cylinders owed, D & R would have Bridges falsify Liquid Air records. Bridges was able to execute the scheme because he had complete control of the paperwork at the Peoria Distribution Center. Pet. App. 2a-3a.

How the Scheme Worked

In early November 1982, the plan in place, D & R stopped returning cylinders. Instead, Rogers and Michlik supplied Bridges with phony quantities of supposedly "returned" cylinders. Bridges entered these numbers on Liquid Air shipping orders, signed for Liquid Air, got a D & R signature or signed for D & R himself, and then mailed the shipping orders to Liquid Air's administrative office in Willowbrook, Illinois, for processing. Willowbrook personnel entered the return information shown on the falsified shipping orders at Liquid Air's remote terminal there. The information was then transmitted by telephone line to Liquid Air's mainframe computer in California. D & R's monthly lease statements showing a reduced cylinder balance were issued in California and mailed to D & R from there. On paper, D & R was relieved of the financial obligation to account for or pay rental on those cylinders. Pet. App. 2a-3a, 11a.

Thus, the actual reductions in D & R's lease statements were made thousands of miles from Peoria,

solely on the basis of falsified figures shown on the D & R shipping orders which Bridges prepared. Each false return resulted in two uses of the mails and one use of the wires. Each time a false shipping order was submitted, Liquid Air was deprived of rent and replacement value on the cylinders. This process was repeated nineteen separate times over seven months.[2] Through Bridges' falsifications, D & R was able to reduce its lease balance to almost zero by June 1983. Pet. App. 3a, 11a.

In return for Bridges' falsification of shipping orders to show D & R cylinder returns that were never made, Rogers and Michlik agreed to set him up in his own welding business in Peoria. They would supply personnel, capital and welding products. By setting up Bridges in business, Rogers and Michlik were able to expand their business into Peoria. They were prevented from doing so directly by a noncompetition agreement with a Peoria welding supply company, A.W. Moore Welding. Rogers and Michlik could thus circumvent the noncompetition agreement with Moore Welding while simultaneously eliminating their cylinder return problem and saving themselves hundreds of thousands of dollars in additional cylinder rental and replacement costs. Pet. App. 3a.

Uncovering the Scheme

On August 3 and 4, 1983, Sage visited the Peoria Distribution Center. Sage became suspicious after another Liquid Air employee reported seeing Bridges removing cylinders from the Peoria Distribution Center. Bridges' claimed to have permission from Sage to do so, but Sage had given Bridges no such permission. Sage began to

---

[2] Petitioners attempt to relitigate the settled facts and mislead this Court by stating that there were sixteen falsified shipping orders. Pet. 4-5. The Appellate Court found, as Liquid Air proved to the jury, that there were nineteen separate falsified returns. Pet. App. 10a-11a.

question the cylinder supply in Peoria, and realized that had D & R actually made its returns he should have seen many thousands more cylinders piled up in Peoria than he did. Sage returned to the regional office and enlisted Gil McCaw ("McCaw"), Liquid Air's Administration Manager, to determine whether cylinders were missing from Peoria. Pet. App. 3a.

McCaw projected the number of cylinders that should have been in Peoria at that time, assuming that D & R had returned all of the cylinders it claimed to have returned. McCaw then compared this projected inventory to the actual physical inventory taken in Peoria for July 1983, and discovered that, on paper, D & R appeared to have returned many more cylinders to Peoria than actually were there. McCaw confirmed this analysis by conducting a physical inventory of the cylinders in Peoria. McCaw's analysis showed that 3,307 cylinders were missing. The difference between the number of cylinders that should have been in Peoria in July 1983 and the number actually there (3,307) is almost exactly the same as the number of cylinders allegedly returned by D & R during the period when the scheme operated, *i.e.*, from November 1982 to June 1983. Pet. App. 3a.

McCaw's analysis also revealed that just before the falsified returns began, Bridges stopped completing the required monthly inventories of cylinders located at the Peoria Distribution Center. Bridges thus eliminated the only means by which Liquid Air personnel outside of Peoria could know how many cylinders were actually present in Peoria. Inventory was not taken again until July 1983, immediately after Bridges left Liquid Air to go into the business set up by Rogers and Michlik.

Proof of the Fraud

Notwithstanding D & R's claim throughout the litigation that it had returned all but 12 cylinders to Liquid Air by June 1, 1983, over a year after the suit was

filed, D & R's dockman revealed during his deposition that D & R at that time had 220 Liquid Air cylinders in its possession. At trial, the dockman testified that the number had grown to 290. Only after the trial did D & R disclose that it actually had 530 Liquid Air cylinders in its possession – cylinders which it ultimately returned to Liquid Air to reduce the judgment. Pet. App. 22a, 32a-33a.

Liquid Air also discovered numerous irregularities in the falsified returns and in petitioners' explanation of how those "returns" were made. All of the falsified shipping orders were signed by Rogers and Michlik, and their assistant Oliver Pennypacker, while those few legitimate returns were filled out by D & R's regular drivers. Notwithstanding Rogers, Michlik and Pennypacker's claims to have returned cylinders, none of Liquid Air's employees had seen them at the Peoria Distribution Center. Even D & R employees testified that they had not seen Rogers, Michlik or Pennypacker drive a truck during the relevant period. Pet. App. 12a.

In answer to this, petitioners claimed that they returned cylinders at times when there were no Liquid Air employees around other than Bridges. This was contradicted by Liquid Air employee time records, which showed that Liquid Air's dockmen were routinely working on the dates reflected on the falsified shipping orders. Petitioners could offer no explanation for this inconsistency. Indeed, at trial petitioners could not even agree on who was responsible for counting the cylinders reflected on the falsified shipping orders. Pet. App. 12a-13a.

Notwithstanding defendants' persistent denial of D & R's involvement with Bridges Welding, the evidence to the contrary included the following: Jack Rogers had asked his former business partner to go into business in Bridges Welding with him; Bridges Welding was incorporated and held its first organizational meeting while Bridges was still a Liquid Air employee; D & R supplied

personnel and over $100,000 in welding supplies to Bridges Welding without charge; Michlik cosigned a loan thus enabling his nephew to buy stock in Bridges Welding; Bridges Welding leased all its cylinders from Rogers' son Butch, who purchased them through D & R. Pet. App. 16a.

As a direct result of Bridges Welding's presence in Peoria, Moore Welding lost customers. Moore Welding was thus injured when D & R set Bridges up in business to circumvent its noncompetition agreement. Pet. App. 11a.

2. Proceedings Below

This cause was tried to a jury in Peoria over two and one half weeks in July 1987. The jury found against all petitioners on all of the counts under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968, and on the conversion count. In addition, the jury returned a verdict against Bridges for breach of fiduciary duty, and against the D & R defendants (D & R, Rogers and Michlik) for inducement to breach of fiduciary duty.[3] Pet. App. 4a.

The jury awarded Liquid Air actual damages of $750,000 (before trebling) on each RICO count and on the count for inducement to breach of fiduciary duty. On the conversion count, the jury awarded actual damages of $350,000 and punitive damages of $25,000 against D & R; $15,000 against Bridges Welding; $10,000 each against Rogers and Michlik, and $5,000 against Bridges. In addition, the jury assessed actual damages of $4,000 and punitive damages of $1,000 against Bridges for breach of fiduciary duty. Pet. App. 4a. Liquid Air's recovery was limited to the greatest single recovery under any one count. Pet. App. 4a n. 1.

---

[3] The jury returned verdicts for Bridges on two counts concerning misappropriation of miscellaneous property and welding supplies unrelated to the 3,307 cylinders.

Petitioners raised 30 separate issues on appeal. All were rejected by a unanimous panel of the Seventh Circuit, which affirmed the judgment below in an opinion written by Chief Judge Bauer. Pet. App. 1a-23a. Petitioners' motion for reconsideration or hearing *en banc* was denied. Pet. App. 26a-27a.

ARGUMENT

I. The Seventh Circuit Correctly Held That Petitioners' Conduct Constituted a Pattern of Racketeering Activity as Defined Under RICO.

The RICO Act defines a pattern of racketeering activity as at least two acts of racketeering activity committed within a ten-year period. 18 U.S.C. § 1961(5). In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), this Court commented that a pattern requires continuity plus relationship among those predicate acts. *Id.* at 496 n. 14.

Consistent with RICO and *Sedima*, the Seventh Circuit has adopted a fact-based test for deciding whether a plaintiff has demonstrated the existence of a pattern of racketeering activity. Under this test, in determining whether the acts are sufficiently continuous and related to form a pattern, a court must examine the following factors: the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. *Morgan v. Bank of Waukegan*, 804 F. 2d 970, 975 (7th Cir. 1986).

Applying that test here, the Seventh Circuit correctly found that petitioners had engaged in a pattern of racketeering activity. As the Court noted, petitioners defrauded Liquid Air through the execution of nineteen separate fraudulent shipping orders falsely reflecting the return of cylinders that, in fact, were never returned. Pet. App. 11a. Each fraudulent return resulted in two acts of mail fraud and one act of wire fraud. Each fraudulent return

resulted in a separate and distinct injury to Liquid Air, and a benefit to D & R. Petitioners could have terminated their scheme at any time. Instead, week after week, for seven months, they renewed their efforts to defraud Liquid Air. The Seventh Circuit held that such "repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO." Pet. App. 11a.

Contrary to petitioners' assertion (Pet. 13-15), the Seventh Circuit's opinion here does not conflict with its earlier opinion in *Morgan*. The Court's conclusion here that there was repeated infliction of economic injury is merely the result of applying the factual criteria first identified in *Morgan*. As the Court stated in the instant case, "Morgan envisioned a fact-specific inquiry, in which no single factor would be determinative." Pet. App. 11a. The Seventh Circuit saw no inconsistency here, and Petitioners mislead this Court by suggesting that any exists.

Similarly, there is no clear conflict between the Seventh Circuit's holding in the instant case and that of the Eighth Circuit in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). In *Superior Oil*, the Eighth Circuit, like the Seventh after it, stressed that a pattern of racketeering activity required "continuity plus relationship." *Id.* at 257. Although the precise nature of the predicate acts is not disclosed, the opinion in *Superior Oil* suggests that the Eighth Circuit could not find continuity in defendant's scheme to convert natural gas from plaintiff. *Id.* at 257. The Court stated that multiple schemes were required, but made clear that the determination of pattern would be intensely factual. Both circuits agree that such continuity must exist for a pattern of racketeering activity to be found. Thus, in the instant case, the Eighth Circuit's stated requirement of multiple schemes could have been satisfied by the repeated infliction of economic injury to Liquid Air that the Seventh Circuit found, or by the separate but additional injury to Moore Welding in Peoria, that resulted from the scheme.

Even assuming, *arguendo*, that the Eighth Circuit's holding in *Superior Oil* concerning RICO's pattern requirement conflicts with that of other circuits, certiorari should still be denied here. There is evidence that the Eighth Circuit's position is still evolving. In separate concurrences to an opinion issued in late 1987, two Eighth Circuit judges expressly requested that the Circuit reevaluate its ruling in *Superior Oil*, stating that the "multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F. 2d 648, 650-651 (8th Cir. 1987) Accordingly, there is no reason for the Court to review the correct decision of the Seventh Circuit.

II. Petitioners' Other Arguments Do Not Present Issues Worthy of Review by This Court.

Petitioners' other arguments for review are frivolous. Every court that has decided the question of the standard of proof under RICO has applied the preponderance of the evidence standard. *Wilcox v. First Interstate Bank of Oregon*, 815 F. 2d 522, 531 (9th Cir. 1987); *Cullen v. Margiotta*, 811 F. 2d 698, 731 (2d Cir. 1987), *cert. denied*, 107 S.Ct. 3266 (1987); *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F. 2d 475, 480-481 (5th Cir. 1986); *United States v. Local 560 of the Int'l Brotherhood of Teamsters*, 780 F. 2d 267, 279 n.12 (3d Cir. 1985). As the Seventh Circuit held, this result is consistent with the holding in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), where this Court approved a preponderance standard in securities fraud actions. Pet. App. 7a-8a.

Neither law nor logic supports petitioners' argument that criminal procedural protections should apply in civil RICO actions between private litigants. This argument relies on petitioners' characterization of the statute as quasi-criminal. Pet. 16. Petitioner cites no case involving a private civil damages action in which this Court, or any court, has accorded a defendant the procedural protections

he would receive in a criminal prosecution by the government. The Seventh Circuit summarily dismissed this argument. Pet. App. 7a n. 2.

Petitioners' argument that treble damages constitute an excessive fine under the Eighth Amendment is equally baseless. As the Seventh Circuit noted, this argument has been flatly rejected in antitrust cases by lower courts. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404 (S.D.N.Y. 1978), *revs'd in part on other grounds*, 603 F. 2d 263 (2d Cir. 1979). Moreover, petitioners' reliance for this argument on *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) is misguided. There, this Court in dicta addressed solely the issue of punitive damages, which, unlike statutory treble damages, are subject to complete jury discretion and are not necessarily tied to any measure of actual damages.

Finally, petitioners' arguments concerning both the measure of damages and the imposition of vicarious liability under RICO present questions intimately tied to the particular facts of this case, not recurring questions of law that have application in other cases or that require resolution or even comment by this Court. In affirming the damages awards here, the Appellate Court found, consistent with *Sedima*, 473 U.S. at 497, that the measure of damages under civil RICO is the harm occasioned as a result of the predicate acts. Pet. App. 21a. Here, Liquid Air's damages were equal to what it was entitled to receive under its contract, *i.e.*, the replacement value of the cylinders plus lost rent. In concluding that Bridges Welding was vicariously liable, the Seventh Circuit merely applied textbook corporation law to the plain language of RICO.

CONCLUSION

In sum, petitioners have presented no valid reason for this Court to review the Seventh Circuit's unanimous affirmance of the jury's verdicts for plaintiff Liquid Air. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM G. SCHOPF, JR.*
PAULA E. LITT
SCHOPF & WEISS
304 West Randolph Street
Chicago, Illinois 60606
(312) 701-9300

Attorneys for Respondent
Liquid Air Corporation

**Counsel of Record*

Date: March 2, 1988